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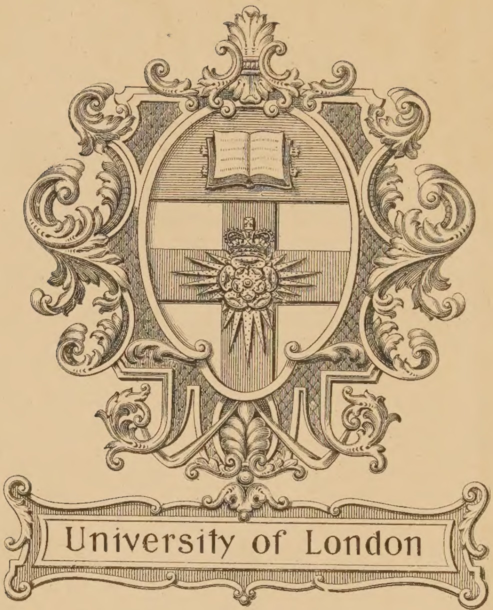
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THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTS

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

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AND ON APPEAL THEREFROM IN THE

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1930.—II. Ch.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
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DETERMINED BY THE

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In re SHAWDON ESTATES SETTLEMENT.

[1929. P. 1118.]

C. A.
1930
March 11.

Settled Land—Bankruptcy of Tenant for Life—Assurance by Trustee in Bankruptcy of Life Estate to Person next entitled—"Intent to extinguish the same"—Refusal of Tenant for Life to execute vesting Deed—Vesting Order made—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 105*—Law of Property* (*Amendment*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Sch.*

By s. 105, sub-s. 1, of the Settled Land Act, 1925, where the estate or interest of a tenant for life under a settlement has been or is absolutely assured with intent to extinguish the same, to the person next entitled in remainder, the statutory powers of the tenant for life in reference to the property affected by the settlement shall cease to be exercisable by him, and shall be exercisable as if he were dead, without prejudice to incumbrances affecting the estate assured:—

Held, that the operation of the sub-section was not confined to the case of an assurance by the tenant for life himself of his estate, but extended to an assurance by any person in whom the life estate was vested, including a trustee in bankruptcy of the tenant for life. The "intent" referred to in the section was the intent of the assignor.

Where therefore a tenant for life was bankrupt, and his trustee in bankruptcy sold and assured the estate for life to the tenant in tail in remainder, but the tenant for life refused to execute a vesting deed in his favour:—

Held, that the tenant in tail was entitled to a vesting order under s. 12, sub-s. 1 (*a*), of the Settled Land Act, 1925.

Decision of Eve J. affirmed [1930] 1 Ch. 217.

APPEAL from a decision of Eve J. (1)

By a settlement dated January 27, 1902, and made between William Hargrave Pawson of the first part, Violet Margaret Gaskell of the second part, and the Right Honourable Robert George Canning, Baron Harris, John Jervis Pawson, Thomas Cole Porter and Henry Kershaw of the third part (being a settlement made upon the marriage of W. H. Pawson and V. M. Gaskell), certain freehold properties known as the Shawdon Estates in Northumberland and Durham, were limited, after the marriage was solemnized, to the use of W. H. Pawson during his life with remainder to uses for securing a jointure rent-charge to V. M. Gaskell (afterwards V. M. Pawson) during her life, and subject thereto to the use of the trustees for a term of 1000 years for securing portions, and subject to the said term, to the use of the first and other sons of W. H. Pawson by the said V. M. Gaskell or any other wife, successively according to seniority in tail male, with remainders over. The settlement contained certain powers of charging in the event of the remarriage of W. H. Pawson after the death of V. M. Gaskell (which event happened), and other powers in extension of those conferred upon a tenant for life by the Settled Land Acts.

The applicant, William John Hargrave Pawson, was the eldest son of the said marriage, and was born on December 6, 1902. V. M. Pawson died on November 7, 1922. The marriage had been dissolved and both spouses remarried.

On November 7, 1907, W. H. Pawson was adjudicated bankrupt, and A. C. Bourner was appointed trustee of his estate.

By a vesting deed dated November 1, 1926, and made between the respondent J. J. Pawson and G. Kershaw, the then trustees of the settlement, of the one part, and the respondent W. H. Pawson of the other part, the said trustees declared that all the property remaining subject to the limitations of the settlement, was vested in the said W. H. Pawson in fee simple that he should stand possessed thereof upon the trusts and subject to the powers and provisions upon and subject to which the same ought to be held from time to time, that the said J. J. Pawson and G. Kershaw were the trustees of the settlement for the purposes of the Settled Land Acts, 1925, and that additional or larger powers were conferred by the settlement in relation to the settled property.

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(1) [1930] 1 Ch. 217.

Early in 1929 the applicant agreed with the trustee in bankruptcy to purchase the life estate in possession of the bankrupt in the settled property, subject to the several incumbrances thereon created by the bankrupt, for the sum or price of 4000*l.*, and by a conveyance dated March 21, 1929, and made between the said A. C. Bourner of the first part, the said J. J. Pawson and G. Kershaw of the second part, and the applicant of the third part, the said A. C. Bourner as trustee in consideration of the sum of 4000*l.*, then paid to him by the applicant, conveyed to the applicant all the settled property for the residue of the life of the respondent W. H. Pawson with intent to extinguish the said life estate therein of the said respondent and so as to vest in the applicant the statutory powers of the said respondent under s. 105 of the Settled Land Act, 1925, but subject and without prejudice to the various mortgages specified in the second schedule thereto, to any other incumbrances affecting the said life estate and to the rights to which any incumbrancer would have been entitled if the powers conferred by the Settled Land Act, 1925, as amended had remained exercisable by the said respondent.

At about the same time a vesting deed was prepared for the purpose of enabling W. H. Pawson to vest the legal estate in the settled property in the applicant in accordance with s. 7, sub-s. 4, of the Settled Land Act, 1925, but W. H. Pawson refused to approve the draft and later, to execute the engrossment.

The present summons was taken out by the applicant under s. 12 of the Settled Land Act, 1925, for a vesting order, vesting the freehold properties described in the schedule to the summons, being the Shawdon Estates, in the applicant for all the estate and interest therein of W. H. Pawson, the respondent to the summons, subject to a charge by way of legal mortgage as to part of the property.

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Eve J. granted the application, holding that s. 105 was to be construed as an exception to the rule contained in s. 104 that the powers of a tenant for life were incapable of assignment or release. The wording of s. 105 was general, and was not confined to the case of an assurance by a tenant for life. The assignee must be the person next entitled in remainder, but the assignor, the person entitled to express the "intent," might be anyone in whom the life estate was vested. There were no grounds for holding that a trustee in bankruptcy could not avail himself of the section, and the applicant was therefore entitled to a vesting order.

The respondent W. H. Pawson appealed. The appeal was heard on March 11, 1930.

W. F. Swords K.C. and *A. J. Belsham* for the appellant. The question is whether the trustee in bankruptcy of the appellant can convey to the purchaser the whole of the estate and interest of the appellant under the settlement "with intent to extinguish the same" within the meaning of s. 105, sub-s. 1, of the Settled Land Act, 1925. (1)

The whole policy of the Settled Land Act, 1925, is jealously to guard the powers of a tenant for life and to prevent trafficking in those powers. This appears on examination of the relevant sections of the Act.

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(1) Settled Land Act, 1925, s. 105, sub-s. 1:* "Where the estate or interest of a tenant for life under the settlement has been or is absolutely assured with intent to extinguish the same, either before or after the commencement of this Act, to the person next entitled in remainder or reversion under the settlement, then, the statutory powers of the tenant for life under this Act shall, in reference to the property affected by the assurance, and notwithstanding the provisions of the last preceding section, cease to be exercisable by him, and the statutory powers shall thenceforth become exercisable as if he were dead, but without prejudice to any incumbrance affecting the estate or interest assured, and to the rights to which any incumbrancer would have been entitled if those powers had remained exercisable by the tenant for life."

Sub-s. 2: "In this section 'assurance' means any surrender, conveyance, assignment or appointment under a power (whether vested in any person solely, or jointly in two or more persons) which operates in equity to extinguish the estate or interest of the tenant for life, and 'assured' has a corresponding meaning."

* As amended by the Law of Property (Amendment) Act, 1926, Sch.

Under the Act none of the statutory powers passes to the trustee in bankruptcy: s. 19, sub-s. 4. Sect. 24, sub-s. 1, gives the Court power, where a tenant for life has no substantial estate or interest in the settled land, to authorize the trustees of the settlement to exercise those powers in the name of the tenant for life. In such a case, however, the trustees do not become the "statutory owner": see s. 117, sub-s. 1 (xxvi.).

Under s. 103 the trustee in bankruptcy does not take the legal estate vested in the tenant for life. It is clear that the trustee in bankruptcy cannot vest the legal estate in another person. By s. 104 the powers of a tenant for life are not capable of assignment.

The "intent" referred to in s. 105 is the intent of the persons in whom the powers are vested. Upon the bankruptcy of a tenant for life there are excluded from what passes to his trustee in bankruptcy his powers as tenant for life, and his trustee in bankruptcy cannot make use of s. 105 to sell those statutory powers. The trustee in bankruptcy has nothing vested in him which entitles him to express an "intent" to extinguish the statutory powers. All that vests in him is the right to receive the rents and profits of the estate during the life of the tenant for life. The tenant for life has other powers under the settlement besides his statutory powers—e.g., the power to jointure a wife and the power to charge portions for younger children. These powers remain in him, and therefore the estate or interest of a tenant for life cannot be assured by the trustee in bankruptcy so as to bring into operation s. 105. The question in this case turns on the narrow point: who is to express the "intent"?

[LORD HANWORTH M.R. My trouble is the definition clause.]

The question of "intent" is a question of fact. It need not be expressed. A conveyance by the tenant for life to the remainderman would without any expression of intent effect a merger. The conveyance would have a double operation—i.e., to assure the beneficial interest and to extinguish the powers. To preserve his powers the tenant for life must expressly negative the intent to extinguish them. This cannot apply to the trustee in bankruptcy. His conveyance cannot operate to extinguish the powers of another: compare sub-s. 5 of s. 62 of the Law of Property Act, 1925, which is analogous.

The tenant for life is a trustee of his powers, a trustee who cannot retire. The only way he can be divested thereof is by an order of the Court under s. 24 of the Act of 1925, or by his own volition in the circumstances contemplated by s. 105.

Sir Thomas Hughes K.C. and *C. Church* for the respondent W. J. H. Pawson were not called upon to argue.

Wynn Parry for the surviving trustee of the settlement.

H. S. G. Buckmaster for the trustee in bankruptcy of W. H. Pawson.

LORD HANWORTH M.R. This is an appeal from a judgment of Eve J. upon an originating summons. The facts are fully stated in the judgment of Eve J. (1) It is, however, necessary to state some of the facts quite shortly for the purpose of making clear the point which has been taken on the appeal.

On the occasion of his marriage, which took place in 1902, William Hargrave Pawson executed a settlement, and under the settlement he became tenant for life. The applicant in this case, the respondent to the appeal, William John Hargrave Pawson, is the tenant in tail in remainder. Unfortunately, the father became bankrupt in 1907, and I need not recount the other facts which are stated by Eve J.; but by a conveyance on March 21, 1929, made between the trustee in bankruptcy and the present respondent, the trustee in bankruptcy conveyed to the respondent all the settled property for the residue of the life of William Hargrave Pawson with intent to extinguish the said life estate therein of the said William Hargrave Pawson, and so as to vest in the son, the respondent, the statutory powers under s. 105 of the Settled Land Act, 1925.

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Now the contest arose between the son and his father, and the summons was taken out for the purpose of having it declared that under and by virtue of the conveyance of March 21, 1929, there had vested in the applicant—that is the son—all the estate and interest of William Hargrave Pawson in the premises which were conveyed in the conveyance of March 21, 1929. The dispute was as to whether or not that conveyance was effective—to put it quite shortly—to displace the father and to put the son in his place for the residue of the life of the tenant for life, that is the father. Eve J. has held that the contention of the son is right, and has made an order in the terms asked by the summons. From that decision appeal is brought.

I agree with the decision and the reasoning of Eve J. What is said is this, that s. 105, sub-s. 1, does not displace the right of the tenant for life to the extent to which Eve J.'s judgment allows. The words of the sub-section are: "Where the estate or interest of a tenant for life under the settlement has been or is absolutely assured with intent to extinguish the same, either before or after the commencement of this Act, to the person next entitled in remainder." It is said that the intent cannot be expressed by any one except the tenant for life himself, that no assignee, such as a trustee in bankruptcy, or any other assignee, is capable of expressing the intent, and that without the intent the conveyance of March 21, 1929, does not have the effect which s. 105 would give it—namely, that all the powers of the tenant for life are no longer to be exercisable by him and that the statutory powers thenceforth become exercisable by his successor as if he were dead. It is said that the personal powers of the tenant for life are not excluded by the terms of this section.

I agree with Eve J.'s view. He rightly calls attention to the fact that s. 105 is drawn in wide terms. There are no words in it confining its operation to the tenant for life personally, whereas, as he suggests, it might easily have been done. Eve J. says (1): "Had such been the intention

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the opening sentence might have been expected to have read somewhat as follows: 'When the tenant for life under the settlement absolutely assures his estate or interest with intent to extinguish the same.'" That is not the case. The words are wide and there are no restrictive words confining the operation of the section to the tenant for life personally.

In my view too some assistance is obtained from sub-s. 2, for by that sub-section it is provided that: "In this section 'assurance' means any surrender, conveyance, assignment or appointment under a power . . . . which operates in equity to extinguish the estate or interest of the tenant for life, and 'assured' has a corresponding meaning." That is the quality or characteristic of the surrender, conveyance or assignment which is connoted by the word "assurance" or "assured." Where, therefore, you have the words as you have in s. 105, sub-s. 1, "Where the estate or interest of a tenant for life under the settlement has been or is absolutely assured," that means not merely that it has been conveyed or assigned, but that it has been conveyed or assigned in such a manner as operates in equity to extinguish the estate or interest of the tenant for life. It means, therefore, that in the very term used, "assured," you have a particular quality with which the conveyance is invested, and that being so it carries with it the intent to extinguish the same, for the persons who are parties to it must be presumed to have intended the consequences of their act and to have entered into the deed, whether for conveyance or assignment or the like, with the knowledge and intent that it shall have the quality which is attached to it by the operation of the interpretation clause.

Now it may be that where in a deed there are some words to negative the intent some other effect will be produced. Mr. Swords has asked us to limit our judgment to the point before us, and I am not at all reluctant to do so. I therefore do not intend to say more except that for reasons which I have ventured to add myself I find myself in accord with the reasoning and decision of Eve J. as pronounced in his judgment. With regard to the terrible results which Mr. Belsham has indicated may arise out of this judgment, I will endeavour to meet them fearlessly as and when they do arise.

LAWRENCE L.J. I agree. In my judgment, the construction placed by Eve J. on s. 105 of the Settled Land Act, 1925, is plainly right. There is nothing in the section to confine it to the case of an assurance by the tenant for himself or to make it inapplicable to an assurance by an assignee of a tenant for life. It is clear from the provisions of ss. 104 and 107 that the tenant for life is incapable of assigning or releasing his powers under the Act, in relation to the exercise of which he is in the position of a trustee for all parties interested under the settlement. The fact that an assignee of the tenant for life is not invested with those powers, however, seems to me to be wholly immaterial in determining whether there has been an assurance operating to extinguish the estate or interest of the tenant for life within the meaning of s. 105.

By virtue of that section whenever the estate or interest of the tenant for life in the settled land is assured to the person next in remainder under the settlement so as to extinguish that estate or interest, then the powers of the tenant for life under the Act cease to be exercisable by him and become exercisable as if he were dead. It is the extinguishment of the estate or interest of the tenant for life which brings about the cesser of his powers. Where there has been an assignment (by operation of law or otherwise) of the whole estate or interest of the tenant for life, the extinguishment of that estate or interest can be accomplished by an assurance by the assignee just as effectually as it could have been accomplished by an assurance by the tenant for life himself had there been no assignment of his estate or interest.

ROMER L.J. I agree. The first question, I think, that we have to determine is whether the estate or interest of the tenant for life under the settlement has been assigned. I desire to dissent emphatically from the suggestion that the powers of a tenant for life to charge portions in favour of his children or to appoint a jointure in favour of a wife, to appoint new trustees, to act as protector of the settlement, form any part of his estate or interest under the settlement. The only reason why it is said that the estate or interest of the tenant for life has not passed to the person next entitled in remainder is that he possessed such powers as I have mentioned. As was pointed out in the argument, if the contention be well founded, it is difficult to think of a case in which a tenant for life could assign his estate or interest under the settlement to a person next entitled in remainder so as to effect a merger.

The next question is whether the estate or interest has been assigned to the person next entitled in remainder with intent to merge the same within the meaning of s. 105. It is said that it has not, because the intent referred to in that section must be an intent not of the assignor but of the tenant for life himself. There is nothing whatsoever in the section to indicate that the intent must be the intent of some one other than the assignor; and unless there be some principle of construction by which we are bound to assume that the Legislature never intends what it says, I cannot see how I can give effect to that argument. It was said: "Oh, but if you look through the Act you will find that the Legislature has taken careful steps to preserve to the tenant for life, whatever he does or whatever he suffers, the powers of the Act." I do not take that view at all. One looks at the sections of the Act to which reference has been made, and one does find that very careful provision is made by the Legislature that the tenant for life shall not hand over to strangers to the settlement the carrying into effect of the powers given to him as a tenant for life; but one does find in the very sections to which our attention has been called, provision made by the Legislature for the exercise of those powers by persons other than the tenant for life who are themselves interested under the settlement. Take s. 19, sub-s. 4, which is the first one to which our attention has been called. That provides as follows: "A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent, and notwithstanding any assignment by operation of law or otherwise of his estate or interest under the settlement, whether before or after it came into possession"—now observe the words that follow—"other than an assurance which extinguishes that estate or interest." It is interesting to observe that in that section no reference is made to intent at all, and that leads me to suppose—as indeed I think I should have supposed anyhow—that the reference to intent in s. 105 is inserted for the purpose of making it clear that where an intent is expressed that there shall not be a merger, the effect mentioned in sub-s. 4 shall not take place.

The next section to which our attention was called was s. 24, sub-s. 1. That provides that in certain circumstances the Court may make an order vesting the powers of the tenant for life in the trustees of the settlement. Finally we come to this very section we are to deal with, s. 105, which so far as I understand it provides that where the interest of the tenant for life has ceased by reason of its having become merged in the estate or interest of the person next entitled under the settlement, then the powers of the tenant for life shall cease. It seems to me that the construction Eve J. has put upon the section is precisely in accordance with what has been called the spirit of the Act.

I agree that this appeal should be dismissed with the usual consequences.

Appeal dismissed.

Solicitors: *Oliver Richards & Parker; Beachcroft, Hay & Ledward; Mawby & Barrie.*

W. I. C.

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[1929. C. 2627.]

Will—Settled Land—Settled Legacies—Appointments of new Trustees of Will—Equitable Fee Simple in Land vested subject to Priorities in former Tenant in Tail—Land released from Charges and vested in former Tenant in Tail as Freeholder—Claim by Freeholder to Appointments of new Trustees as forming Part of Title to Land—Law of Property Amendment Act, 1860 (23 *&* 24 *Vict. c.* 38), *s.* 7—*Larceny Act,* 1861 (24 *&* 25 *Vict. c.* 96), *s.* 28 —*Vendor and Purchaser Act,* 1874 (37 *&* 38 *Vict. c.* 78), *s.* 2—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 17, 110—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 45, *sub-ss.* 4 (*a*), 9 (*b*).

A testator died having by his will bequeathed settled legacies and having thereby also by legal limitations settled freeholds which in the events which happened became vested free from incumbrances and charges in the plaintiff. From time to time there had been appointments of new trustees of the testator's will for the purposes of the Settled Land Acts and other purposes, including three by deeds of 1902, 1904 and 1915. In 1924 the plaintiff had been appointed Settled Land Act trustee of the testator's will, jointly with the then trustees thereof, the appointment being limited to the freeholds. At the date when the freeholds became vested absolutely in the plaintiff, the trusts of some of the settled legacies were still on foot. In an action by the plaintiff claiming the custody of the appointments of 1902, 1904, and 1915, as forming part of his title to the freeholds:—

Held, (i.) that absolute ownership of land does not necessarily carry with it the right to title deeds:

(ii.) that trustees who have duties to perform in relation to their trusts may retain title deeds lawfully in their possession as trustees.

Semble, the phrase "title deeds" in the old authorities includes only deeds assuring or dealing with land or legal interests therein.

Lord Buckhurst's Case (1595) Moore, 488 and *Kelsack* v. *Nicholson* (1596) Cro. Eliz. 496 applied.

Ford v. *Peering* (1789) 1 Ves. Jun. 72; *Malone* v. *Minoughan* (1862) 14 Ir. C. L. 540; *Ex parte Holdsworth* (1838) 4 Bing. N. C. 386; and *In re Williams and Duchess of Newcastle's Contract* [1897] 2 Ch. 144 referred to.

ACTION.

The following statement of the facts is taken from his Lordship's considered judgment:—

In this case the plaintiff, who is the absolute owner of extensive freehold estates in the county of Northumberland, claims a declaration that he is entitled to the custody of three indentures dated April 30, 1902, January 6, 1904, and

April 28, 1915, being three appointments of new trustees of the will of his grandfather Nathaniel George Clayton, and an order on the defendants, who are trustees of the said will, to deliver up the said indentures to the plaintiff.

The facts are simple and not in dispute. Nathaniel George Clayton by his will dated March 8, 1895, devised the estates (subject to certain uses not relevant to the present purpose) to the use of his wife Isabel Clayton for her life and after her death to the use of his younger son Edward Francis Clayton for his life and after his death to the use of every son born in the lifetime of the testator of the said Edward Francis Clayton and his issue male as therein mentioned with remainder to the use of every son born after the death of the testator of the said Edward Francis Clayton in tail male in succession. By the will certain persons were appointed to be executors and trustees for the purposes therein expressed including the purposes of the Settled Land Acts. Nathaniel George Clayton died in 1895 and his will was duly proved. The plaintiff was born in 1902 and is the eldest son of Edward Francis Clayton, who died in 1922. Isabel Clayton died on April 27, 1928, and, therefore, after the Law of Property Act, 1925 had come into operation. By disentailing deed dated January 1, 1928, the plaintiff disentailed the estates in such manner as to vest the same in him for an equitable estate in fee simple subject to all estates interests and charges having priority to the plaintiff's entailed interests. On March 8, 1929, probate of the will of Isabel Clayton limited to the settled estates was granted to the defendants and the plaintiff; and by vesting assent dated May 8, 1929, and made between the defendants and the plaintiff of the one part and the plaintiff of the other part, the defendants and the plaintiff as personal representatives of Isabel Clayton assented to the vesting in the plaintiff of the estates upon the trusts declared concerning the same by the will of Nathaniel George Clayton. In the year 1929 the estates were released from the jointure and portions charges which affected them and as a result the plaintiff became beneficially entitled to the estates free from all incumbrances and charges. It will be observed that the trustees of the will of Nathaniel George Clayton had no legal estate, since the limitations were legal. By the will some large settled legacies were bequeathed to the trustees, and the trusts of three of such legacies are still subsisting. There have been a number of appointments of new trustees of the will from time to time, in particular the three appointments by the three indentures above referred to—namely, the appointments of April 30, 1902, January 6, 1904, and April 28, 1915. By an appointment of October 9, 1924, the plaintiff himself was appointed a trustee of the will so far as regards the Clayton Estates jointly with the other trustees thereof for the purposes of the Settled Land Acts but not further or otherwise. By a deed of discharge dated July 10, 1929, the defendants and the plaintiff declared that they were discharged from the trusts of the will of Nathaniel George Clayton so far as regards all the lands subject to the settlement made by the said will: see Settled Land Act, 1925, s. 17. The plaintiff as the absolute owner has recently sold divers parts of the estates and contemplates further sales. He claims to be entitled to the custody of the three appointments of 1902, 1904 and 1915 which he alleges form part of the title to the Clayton Estates. The defendants reply that the three deeds relate to the settled legacies of which the defendants are the trustees and of which the plaintiff is not and never has been a trustee, and that such deeds did not assure any estate or interest whatsoever in any part of the estates which remain vested in the plaintiff. There is no dispute as to the right of the plaintiff to production and to delivery of copies, that being provided for under a deed dated August 12, 1929.

Manning K.C. and *H. F. F. Greenland* for the plaintiff. The plaintiff has become absolutely entitled to the freeholds as from July 10, 1929, when he and the defendants executed a deed of discharge. As owner of the freeholds, he is entitled to all deeds appointing new trustees, including Settled Land Act trustees. The legal tenant for life is always held to be entitled to all title deeds, even to those dealing with other matters. But see now Law of Property Act, 1925, s. 45, sub-s. 4 (*a*). (1) An unnecessary expense is inflicted on the plaintiff if, every time that he sells some part of his estates, he has to pay the expenses of the production of these deeds. According to the authorities the owner of land is entitled to all the muniments. Here there is no other person who can have them on the ground that he is entitled to other property comprised in them: see Settled Land Act, 1925, s. 110; Wolstenholme and Cherry's Conveyancing Statutes, vol. ii., p. 262; Williams' Personal Property, 12th ed. (1884), p. 10; Sugden on Vendor and Purchaser, 14th ed. (1862), p. 433 (ch. xi., s. 4). There are many passages which bear out the doctrine, laid down by Lord St. Leonards, that the person entitled to the land has the deeds: *Harrington* v. *Price* (2); *Leathes* v. *Leathes* (3); *In re Williams and Duchess of Newcastle's Contract* (4); see also Williams on Vendor and Purchaser, 3rd ed., p. 81. There is no general definition of title deeds. A title deed is a document of evidence of title; e.g., a marriage certificate and a birth certificate are not documents of title. In the present case there is, first, the title of the vendor to his land, and, secondly, the trustees' title to give a receipt; both those are part of the vendor's title; every abstract must show any appointments of new trustees: see Co. Litt. 6A. (5) A tenant for

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(1) Sect. 45, sub-s. 4 (*a*): "On a sale of any property, the following expenses shall be borne by the purchaser where he requires them to be incurred for the purpose of verifying the abstract or any other purpose, that is to say—

"(*a*) the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the possession of the vendor or his mortgagee or trustee, and the expenses of all journeys incidental to such production or inspection."

(2) (1832) 3 B. & Ad. 170, 173.

(3) (1877) 5 Ch. D. 221.

(4) [1897] 2 Ch. 144.

(5) Co. Litt. 6A: "A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only against him and his heirs, the purchaser shall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terrae*, to the end he may the better defend the land himself, having no warrantie to recover in value; for the evidences are, as it were, the sinewes of the land, and the feoffor not being bound to warrantie hath no use of them. But if the feoffor be bound to

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life's title must show that the persons who have made title were entitled to make it. Under the Settled Land Act, 1925, it must be shown that the trustees were properly constituted.

F. D. Morton K.C. and *Wilfrid M. Hunt* for the defendants. The primary feature of this action is that it is an action of detinue. The plaintiff must prove that he has a better right than the defendants have to these appointments of new trustees. It is not enough to prove that he has an equal right: *Foster* v. *Crabb.* (1) Those documents are not title deeds: they are records of the persons who from time to time are trustees of the will, and cannot be title deeds within the meaning of the authorities: *In re Lehmann and Walker's Contract.* (2) Title deeds were given to the owner in fee simple of land because they traced the title to it.

Manning K.C. in reply. The question is whether these documents are title deeds within the old meaning of that term which is to be found in the books. The scope of the term may vary from time to time with changes or development in the law of real property. When the changes of 1925 came, the description "title deeds" had to be extended to documents of a novel nature: and the legislation of that year makes these deeds showing the appointment of new Settled Land Act trustees part of the muniments of title of the estate.

MAUGHAM J. [having stated the facts as set out above:] It is perhaps surprising that the solicitors for the parties have not been able to come to an amicable arrangement on the matter of custody; but since that has proved impracticable it becomes necessary to determine the question as one of

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warrantie, so that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that case shall have no deeds that comprehend warrantie, whereof the feoffor may take advantage. Also, he shall have such charter, as may serve him to deraigne the warrantie paramount. Also, he shall have all deeds and evidences, which are materiall for the maintenance of the title of the land; but other evidences which concerne the possession, and not the title of the land, the feoffee shall have them."

(1) (1852) 12 C. B. 136.

(2) [1906] 2 Ch. 640.

legal right. Title deeds, at any rate since the reign of Elizabeth, have been regarded from a somewhat singular standpoint in courts of law. They have been called the sinews of the land: see Co. Litt. 6A, where Sir Edward Coke is apparently stating, not with complete clearness, the effect of *Lord Buckhurst's Case*. (1) An elaborate account of this report (in English) will be found in Dixon on Title Deeds (1826) at p. 13. The case is not without importance on the present occasion and I will transcribe from Dixon the material part of the judgment (p. 27): "Afterwards, and after long deliberation and conference had between the justices, they met, to deliver their opinions concerning the title-deeds only, without discussing the title. And Popham, Chief Justice, in the name of himself and of the other Justices, said they had resolved, that all the title-deeds of the land belong clearly to the feoffee, although there was no mention of them in his purchase, whether they contain warranty or not, unless the feoffor has bound himself to general warranty of the land to the feoffee and his heirs; and if he has, then all the title-deeds material for the defence of any title paramount, whether they contained warranty or not, belonged to the feoffor and his heirs; and the reason he said was, because the agreement of the parties to the feoffment appears to be such, that the feoffee would rely upon his warranty of the land, and that the feoffor and his heirs should make continual defence thereof for the feoffee and his heirs; and when no grant is made of the deeds to the feoffee, it is to be understood that they shall remain with him who is to defend the land, and that is the feoffor and his heirs. Which diversity was the opinion of all of them, upon conference together, and consideration had of all the books and cases cited on both sides; and that, he said, reconciles all the diversities of opinions in the books." From this it appears that the right of an absolute owner of land to the title deeds is not without exception: see also the report of the judgment in 1 Coke's Reports, p. 1. Warranties (of which the curious will find an account in Sheppard's

(1) Moore, 488.

Touchstone, ch. 8) of course have long fallen into disuse; but, as stated in Williams on Personal Property, 12th ed., p. 11, the principle of the rule still applies when the grantor has any other lands to which the deeds relate or retains any legal interest in the lands conveyed. Apart from these, and perhaps other exceptions, it is no doubt true that the immediate freeholder has both in law and in equity a prima facie title to the possession of the title deeds. He may maintain an action of detinue against any person who withholds them from him after demand made: *Lightfoot* v. *Keane* (1), or he may maintain an action of trover: *Harrington* v. *Price* (2), or he could file a bill for the recovery of them: *Garner* v. *Hannyngton.* (3) It is going too far, however, to suggest that the fee simple owner has always a right to the title deeds, for it appears to be settled that he may, if he pleases, give them away: per Gawdy J., *Kelsack* v. *Nicholson* (4); Copinger on Title Deeds, p. 4. By parity of reasoning he could no doubt destroy them. It appears that if in a settlement there is contained a grant of the deeds to the remaindermen that would be good against the freeholder in whom by such settlement a life estate is vested: *Ford* v. *Peering.* (5) The law is stated thus in the case of *Strode* v. *Blackburne* (6) by Lord Chancellor Loughborough: "I have stated that the title deeds are incident to the possession. Prima facie a person in possession of the estate under a title that gives a freehold interest at the least, has a right to the custody of them. They are not considered in law as chattels; but follow and are incident to the estate in the hands of the owner. At law they belong of right to the owner; and do not go to the executor." In old days it seems to have been held that it was not larceny to steal title deeds: see Dixon on Title Deeds, p. 38. This, however, was before the time when deeds on parchment were commonly used for covering lampshades and for the tops of toy drums; and the quaint reason given for the view that there could be no felony in taking away such a thing as a paper or parchment containing an assurance concerning land was that "they being of no manner of use but to the owner, are not supposed to be in danger of being stolen, and therefore need not to be provided for in so strict a manner as those things which are of a known price and everybody's money." (1) The law on this point was, however, altered (perhaps because deeds had become "everybody's money") by 24 & 25 Vict. c. 96, s. 28. It was, of course, the owner of the legal estate who was entitled prima facie to the possession of the title deeds; and there was a controversy which lasted for a hundred years as to whether in the case of conveyances taking effect by force of the Statute of Uses the feoffees or releasees were entitled to the possession or the cestui que use. The question was ultimately decided by the Court of Queen's Bench in Ireland: *Malone* v. *Minoughan* (2), where on the grounds that the feoffee to uses had (as the effect of the then recent Act, 23 & 24 Vict. c. 38, s. 7) no estate or interest, "nothing to assert and nothing to defend," it was held that the cestui que use as the owner of the land was entitled to the deeds. This decision has always been accepted as correct. On the other hand, the trustee who happens to have the legal estate in lands is prima facie entitled to the custody of the title deeds, the cestui que trust having merely a right to inspect and take copies of the deeds: *Ex parte Holdsworth.* (3) The question of the right to custody of title deeds was touched upon in s. 2 of the Vendor and Purchaser Act, 1874, which (inter alia) provided that where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents. This provision came before the Courts in the case of in *In re Williams and Duchess of Newcastle's Contract* (4), and North J., after holding that the section applied only to lands (including leaseholds), went on to decide that when a mortgage comprised both lands and policies of insurance on the life of the mortgagor, on a sale of the land by the mortgagee, he retaining the policies, the purchaser was entitled to have the mortgage deed delivered to him. The decision, however, has not escaped criticism: see Williams on Vendor and Purchaser, 1st ed., p. 604; 3rd ed., p. 640. I should add that I am not concerned to mention the numerous cases between tenant for life and remaindermen or between mortgagor and mortgagee.

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(1) (1836) 1 M. & W. 745.
(2) 3 B. & Ad. 170.
(3) (1856) 22 Beav. 627.
(4) Cro. Eliz. 496.
(5) 1 Ves. Jun. 72.
(6) (1796) 3 Ves. 221, 225.

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(1) [See the late R. S. Wright J.'s much clearer statement in Pollock and Wright on Possession, pp. 233–235: "Things of no value at common law are documents which are merely evidence of rights, agreements, or other choses in action. . . . . The reason of the rules as to value is obscure."—F. P.]

(2) 14 Ir. C. L. 540.

(3) 4 Bing. N. C. 386.

(4) [1897] 2 Ch. 144.

The deeds of appointment in question may have to be produced, in the absence of a special condition of sale, to any purchaser in order to establish that the deed of discharge of July 10, 1925, was executed by persons who were the then trustees of the settlement created by the will. The vesting assent of May 8, 1929, was in this case the first vesting instrument executed for the purpose of giving effect to the settlement subsisting at the commencement of the Act, so that the proviso to s. 110, sub-s. 2, of the Settled Land Act, 1925, operates, and a purchaser cannot therefore make the assumptions mentioned in the early portion of the subsection. I should add that it is provided by s. 45, sub-s. 9 (*b*), of the Law of Property Act, 1925, that a vendor shall be entitled to retain a trust instrument or other instrument creating a trust which is still subsisting or an instrument relating to the appointment or discharge of a trustee of a subsisting trust. This section, however, is applicable only between vendor and purchaser, and is not I think relevant to the present case. I do not think the solution of the present problem is to be found in any consideration of convenience as between the parties. The question is one of strict law—namely, whether the plaintiff is entitled in an action of detinue to recover the three deeds from the present trustees of the will on the ground that they originally were, or as the result of recent legislation have become, title deeds of the estates.

In my opinion the right of the estate owner to the title deeds of his estates is not so absolute as the plaintiff contends. It is true that, if no one else has any legal interest in the subjects dealt with in a title deed, the estate owner is generally entitled to recover such a deed from a stranger. But there are, as appears from the authorities, numerous exceptions. The leading case decided as long ago as the reign of Queen Elizabeth shows clearly that if a feoffor has good reason for wishing to retain a title deed he may be justified in doing so: *Lord Buckhurst's Case.* (1) If this is true in the case of a grantor, who may not derogate from his grant, it must a fortiori be true in the case of trustees who have lawfully become possessed of deeds not directly relating to land, and claimed by an estate owner only because as a matter of evidence it may be necessary for him to give inspection of the deeds to a purchaser. I think also that the deeds of appointment in question, since they did not assure or affect directly any estate or interest in any part of the land, are not title deeds of the land in the legal sense; for, in my opinion, the old authorities refer only to title deeds by which the lands or some legal interest therein is assured or dealt with. It would be almost absurd to contend that the plaintiff, if he obtained possession of the three deeds, would be entitled to destroy them, though he could apparently do so if they are title deeds properly so called. But on the supposition that they are in a general sense title deeds, I hold that the right or title of the defendants to them as trustees, so long as they have duties as trustees to perform, precludes the plaintiff in the circumstances from succeeding in an action of detinue to recover possession of the deeds. The action therefore fails, and must be dismissed with costs.

Solicitors: *Hasties; King, Wigg & Brightman, for Clayton & Gibson, Newcastle-on-Tyne.*

(1) Moore, 488.

K. R. A. H.

CLAUSON
J.

930

Jan. 20;
Feb. 17, 28.

In re SIMMS.

[223 of 1929.]

Bankruptcy—Fraudulent Transfer—Delaying Creditors—Transfer of Business Assets (comprising whole of Debtor's Property) to Private Company—Relation back of Trustee's Title—Protected Transaction—Bona Fides—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), s. 1, *sub.-s* 1 (*b*); *s.* 45.

The transfer by a debtor of substantially the whole of his property, whether by way of charge or by way of sale, constitutes an act of bankruptcy, if the necessary consequence of the transfer will be to defeat or delay his creditors.

The bankrupt was carrying on an increasing business as a builder, but was in need of further capital. He had creditors for some 28,000*l.* and in addition he owed B.'s bank about 6500*l.* In pursuance of an arrangement with L.'s bank, but without notice to any of the creditors, L.'s bank took over the bankrupt's account from B.'s bank, paying off to B.'s bank the overdraft of 6500*l.*; and a few days later, on January 9, 1929, a private limited company was formed of which the bankrupt and his solicitor were the only directors. There was a contemporaneous agreement for sale to the company of substantially the whole of the bankrupt's assets for 17,000*l.* to be satisfied by the issue to the bankrupt of 17,000 1*l.* shares, the company undertaking to pay the bankrupt's liabilities. On January 14 the necessary assignments to the company were executed, and a debenture for 12,500*l.* was sealed in favour of L.'s bank. On January 17 the bankrupt's overdraft on L.'s bank was paid off by a transfer from a new account opened by L.'s bank in favour of the company. Upon the formation of the company and the issue of the debenture becoming known, the bankrupt's creditors began to press, and some of them were paid off in full. On February 27, 1929, the bankrupt committed an act of bankruptcy by failing to comply with a bankruptcy notice. On March 8 a petition was presented, and on May 9 a receiving order was made, and adjudication followed on May 23.

Upon a motion by the trustee for a declaration that the sale agreement of January 9 was void by virtue of s. 1, sub.-s 1 (*b*), of the Bankruptcy Act, 1914, and for ancillary relief :—

Held, first, that the agreement was a fraudulent transfer and an act of bankruptcy, and that the whole of the assets comprised therein formed part of the assets of the bankrupt divisible amongst his creditors, and that, as the trustee's title related back to the act of bankruptcy and overrode that of the company, the company must account to the trustee for such of the assets as had come to the hands of the company or of any person by the order or for the use of the company.

The substitution in the place of a going business and substantial business assets of (*a*) shares in a private company which has taken over the debtor's assets and liabilities and (*b*) a right of action by the debtor against the company on its covenant to discharge his liabilities must necessarily have the result of delaying creditors, and the substituted assets could not be treated as an equivalent which the creditors could reach as satisfactorily as the assets transferred.

Secondly, that s. 45 of the Bankruptcy Act, 1914, protects only transactions which are bona fide; and, as the knowledge of the bankrupt and his solicitor of the facts which stamped it in law as a fraudulent transfer was the knowledge of the company, s. 45 afforded no defence, even although the parties might have thought the transfer to be in the best interest of the creditors.

MOTION IN BANKRUPTCY.

The bankrupt, Mr. Frederick Simms, was, towards the end of 1928, carrying on business as a builder under the style of "William Simms." His business was increasing, and he was in want of further capital. He had creditors for some 28,000*l.* in addition to a liability for 6000*l.* to one Jameson, who had become associated with his business. In addition he owed his bank, Barclays, about 6500*l.* Barclays were not, however, prepared to supply further finance. The bankrupt, through his solicitor, approached Lloyds Bank with the suggestion that they should supply finance up to 10,000*l.* on the security of a debenture to be issued by a private limited company into which the bankrupt's business would be converted. Lloyds Bank, after investigation, intimated their willingness to make advances up to 12,500*l.* on that footing.

On January 9, 1929, the bankrupt's solicitor, under the bankrupt's instructions, formed the respondent company, "William Simms, Limited," in the usual way as a company limited by shares under the Companies Acts. The bankrupt and his solicitor were the sole directors. On the same day an agreement for sale was made between the bankrupt and the company, under which the bankrupt's business assets which, in the proceedings, were treated as comprising the whole, or substantially the whole, of his property, were agreed to be sold to the company for 17,000*l.*, to be satisfied by the issue of 17,000 1*l.* shares in the capital of the company, the company undertaking to pay the bankrupt's liabilities. On January 14, 1929, at a board meeting of the company, that agreement was exchanged, and various assignments and transfers required for the purpose of effectuating it were executed by the bankrupt in the company's favour. At the same meeting debentures for 12,500*l.* were sealed in favour of Lloyds Bank.

At the time of this transaction there were two unsatisfied judgments against the bankrupt amounting together to 400*l.* He did not inform those judgment creditors of the transfer, nor did he give notice to his other creditors. Lloyds had taken over the bankrupt's account from Barclays on December 21, 1928, paying off to Barclays the then overdraft of 6500*l.*, and at the same time taking over from them certain title deeds which had been deposited with Barclays by the bankrupt to secure his overdraft, which deeds Lloyds had ever since retained. Lloyds, in fact, financed the bankrupt between December 21, 1928, and January 17, 1929. On January 17 the bankrupt's overdraft on Lloyds, which stood at 7170*l.*, was paid off by a transfer from a new account opened by Lloyds on January 15 in favour of the company.

There had been a proposal that Jameson's 6000*l.* should be dealt with by issuing him a second debenture, but the proposal was not carried out, and he accepted the company as his debtor for 6000*l.* without security.

Upon the formation of the company and the creation of the debenture becoming known the bankrupt's creditors became alarmed, and began to press. The more pressing of the bankrupt's creditors were paid by the company in full, a circumstance which did not tend to conciliate those creditors who had not been so fortunate. A meeting of creditors was held on February 11, 1929.

On February 14 Lloyds put in a receiver under their debenture.

On February 27, 1929, the bankrupt committed an act of bankruptcy by failure to comply with a bankruptcy notice. A petition on March 8 was followed by a receiving order on May 9 and adjudication on May 23, 1929.

The present motion was launched originally against the company only, and asked for a declaration that the sale agreement of January 9, 1929, was void and of no effect as against the trustee, by virtue of s. 1, sub-s. 1 (*b*), of the

Bankruptcy Act, 1914, and s. 172 of the Law of Property Act, 1925, and for ancillary relief.

The trustee at the hearing did not rely on that section of the Law of Property Act, 1925, which represented the old Statute of 13 Eliz. c. 5. Lloyds Bank and the receiver, realizing that they were vitally interested in the company succeeding on the motion, sought to intervene, and they obtained an order from Luxmoore J. under which Lloyds Bank were added as respondents to the motion. At the hearing the company, who had the same interest as Lloyds Bank to uphold the validity of the transfer, were not separately represented by counsel.

Tindale Davis for the trustee in bankruptcy. The agreement of January 9 ought to be set aside as a fraudulent transfer within the meaning of s. 1, sub-s. 1 (*b*), of the Bankruptcy Act, 1914. The test to be applied is still the same as that which was applied by Jervis C.J. in *Smith* v. *Cannan* (1)—namely, whether the effect of the transfer is to deprive the bankrupt of the means of paying his creditors. Nor is the fact that the transferee has no notice of the circumstances making it an act of bankruptcy material. In circumstances like the present the law assumes intent to defeat or delay creditors from the transfer itself, and it is not necessary to prove that intent. Such a transfer is fraudulent and an act of bankruptcy whether there is a surplus or not, and although the transfer be to secure a valid debt and although by way of mortgage; and that is so, because it prevents the other creditors from issuing execution: *In re Wood.* (2) The result of the authorities is stated by Mellish L.J. in *Ex parte Ellis* (3) to be that where a debtor assigns his whole property as security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. In *In re Sharp* (4) the assignment had the effect of excluding some of the creditors and therefore tended to defeat them, and was void, because the debtor was attempting to substitute for the administration of his assets in bankruptcy a different mode of administration. There there was a transfer of the whole of the debtor's property for a past consideration; and, although the money was intended to be applied for the benefit of creditors, the transaction was impeachable by a creditor who had been left out. As Cotton L.J. said in *Ex parte Chaplin* (1): "If persons will take from a man who is in difficulties a deed . . . . which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law." The transaction here is like the transaction in *In re David and Adlard* (2), which tended to defeat and delay creditors who wished to enforce their ordinary rights against the bankrupt's estate. There was here, as in that case, no equivalent received by the bankrupt. The object in both cases was to enable the bankrupt, who in fact was the company, to carry on his business without interruption by creditors, and that the debenture should not be available for the general body of creditors.

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(1) (1853) 2 E. & B. 35, 42, 43.

(2) (1872) L. R. 7 Ch. 302, 306, 308.

(3) (1876) 2 Ch. D. 797, 798.

(4) (1900) 83 L. T. 416.

The present is even a stronger case than *In re David and Adlard* (2), because the transfer in that case, although it was held to be fraudulent in law, was yet made in good faith, the majority of the creditors joining in the scheme, while in the present case the arrangement for the transfer to the company was unknown to the general body of the creditors: see also *In re Dombrowski.* (3)

Sect. 45 of the Bankruptcy Act, 1914, can afford no protection for the respondent. *Shears* v. *Goddard* (4), it is true, decided that a transaction may receive the protection of s. 45, even though that transaction is an act of bankruptcy; but, as Rigby L.J. explained in that case, that section does not protect a transaction which was fraudulent on the part of the person dealing with the bankrupt. The transaction in that case was an honest one so far as the person dealing with the bankrupt was concerned: the purchaser (who was not a

(1) (1884) 26 Ch. D. 319, 331.
(2) [1914] 2 K. B. 694.
(3) [1923] 8 B. & C. R. 32.
(4) [1896] 1 Q. B. 406.

creditor) in that case was innocent; he knew no facts that rendered the transaction fraudulent in law. It was on that ground that *Shears* v. *Goddard* (1) was distinguished from *In re Jukes* (2), where it was held that the section did not protect a creditor who took over the whole of the debtor's property in satisfaction of a past debt, knowing that there were other creditors.

Rayner Goddard K.C. and *Harold Christie* for the respondents, Lloyds Bank. When the lender makes a substantial advance (as in this particular case) with the object of providing fresh capital to enable the business to be carried on and the creditors to be paid, the authorities go to show that, in such circumstances, a transfer is not regarded as fraudulent in law. The facts are that the principal creditor, Barclays Bank, was paid off, Jameson, another creditor, postponed his claim, 6498*l*. fresh capital was provided and was being applied in satisfying creditors, and the company agreed to pay the creditors of the debtor and to indemnify him against the same.

The effect of obtaining a substantial advance from Lloyds Bank was the same as if there had been a substantial exception from the property transferred to the company: moreover, there were reasonable grounds for the belief that the advance of further capital would enable the debtor to continue the business and pay the creditors. *Ex parte King* (3); *Ex parte Johnson* (4); *Administrator-General of Jamaica* v. *Lascelles, De Mercado & Co.* (5)

A transfer will be held fraudulent when it is made only for the purpose of securing a past debt: per Mellish L.J. *Ex parte Ellis.* (6) The fact that in this case the scheme adopted for the purpose was the formation of a private company to whom the business assets were transferred does not distinguish this case on principle from *Ex parte King* (3) and *Ex parte Johnson.* (4) The bankrupt was not at the date of the transfer insolvent; he was only temporarily embarrassed for want of liquid assets. If he could raise some fresh capital there was a reasonable prospect of the business succeeding. The money advanced was, if not actually paid to the bankrupt, paid to his nominees, the company.

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(1) [1896] 1 Q. B. 406.
(2) [1902] 2 K. B. 58.
(3) (1876) 2 Ch. D. 256, 262.
(4) (1884) 26 Ch. D. 338, 350.
(5) [1894] A. C. 135.
(6) 2 Ch. D. 797, 798.

[Clauson J. But the object of the transfer seems to have been to enable the company, not the debtor, to carry on the business.]

The company was but the alter ego of the bankrupt. The position of the bankrupt was improved by the arrangement: 6000*l.* was provided and paid to a creditor and the additional capital provided was under the control of the bankrupt, and there was an undertaking by the company (which was being carried into effect) to satisfy the liabilities of the bankrupt. The facts here are similar to those in *In re Harris* (1), and the decision in that case is in the respondent's favour. Here the bankrupt and his creditors got 12,500*l.* and shares in the company, equivalent to the assets transferred, and there was intention in good faith to preserve the business; the transaction, therefore, was not one which tended to defeat or delay the creditors. In *In re David and Adlard* (2) the debentures received in consideration of the contract were not available for the general body of the creditors; the bulk of them was handed to particular creditors and the remaining debentures could not be enforced, except in case of default for five years. In *In re Slobodinsky* (3) the debtor was insolvent and the debentures and shares were held to be no equivalent for the creditors. Even if the transfer is held to be an act of bankruptcy, the transaction is protected by s. 45 of the Bankruptcy Act, 1914, since the conditions laid down by the proviso in that section have been complied with; for the transaction took place before the receiving order and the company had no notice of any available act of bankruptcy committed by the debtor before the date of the execution of the transfer: *Shears* v. *Goddard.* (4) It is admitted there must be bona fides in the transaction in order to entitle the bankrupt to claim the protection afforded by s. 45. But in the present transaction there was the intention

(1) (1906) 14 Man. 127.
(2) [1914] 2 K. B. 694.
(3) [1903] 2 K. B. 517.
(4) [1896] 1 Q. B. 406.

bona fide to obtain means of paying the creditors; the assets were not assigned for a past debt nor for the purpose of administering the bankrupt's estate otherwise than in accordance with bankruptcy rules. In those features the transaction is distinguishable from the transactions in *In re Sharp* (1) and *In re Jukes* (2), where the purchasers were themselves creditors of the bankrupt and took the whole of the assets in consideration of a past debt and with knowledge of the existence of other creditors, there was there clear evidence of a fraudulent preference; and again in *In re Wood* (3) the transferee was a creditor of the bankrupt.

Tindale Davis in reply. The company had full notice through the bankrupt as director of the company of the true nature of the transaction and cannot claim the benefit of the protective section, s. 45: *In re Carl Hirth* (4); *In re Slobodinsky.* (5) As regards the undertaking by the company to indemnify the bankrupt, no creditor nor even the trustee could enforce the indemnity; and even if he could get execution against the shares of the bankrupt, such a security for the payment of the liabilities would not be so satisfactory as the payment of cash.

Cur. adv. vult.

Feb. 28. CLAUSON J. [delivered a considered judgment in which, after stating in substance the facts above set out, he continued as follows:] The first question with which I must deal is, whether the sale agreement of January 9, 1929, was an act of bankruptcy. The agreement was followed, after five days, by formal transfers, and the subject-matter of the sale was admittedly taken over by the company within that time, so that no question turns on the document being an agreement for sale and not a conveyance.

The execution of the sale agreement was an act of bankruptcy if thereby the bankrupt made a fraudulent transfer of his property or any part thereof: see s. 1, sub-s. 1 (*b*), of the Bankruptcy Act, 1914. The interpretation of those words, so far, at

(1) 83 L. T. 416.
(2) [1902] 2 K. B. 58.
(3) L. R. 7 Ch. 302.
(4) [1899] 1 Q. B. 612.
(5) [1903] 2 K. B. 517.

all events, as such a case as that before me is concerned, seems to me to be in a Court of first instance, now free from doubt. The authorities stand thus. In *Smith* v. *Cannan* (1) the Court of Exchequer Chamber had to deal with 12 & 13 Vict. c. 106, s. 67, which enacted that a trader committed an act of bankruptcy if he made a fraudulent conveyance of any of his lands, goods or chattels with intent to defeat or delay his creditors. Jervis C.J. said the real test is, has the trader by the deed put his property out of his control, so as to deprive himself of the present power to satisfy his creditors, as, but for the deed, he might do ? Chief Baron Pollock's view was that the fact that the deed necessarily delayed the creditors was evidence to go to the jury that it was a fraudulent conveyance made with intent to defeat or delay the creditors. Baron Parke said that the test is whether the necessary effect of the deed is to delay the creditors. It will be observed that the question whether the document was a fraudulent conveyance made with intent to delay the creditors had been left to the jury, and the jury had found a verdict which involved the affirmative of the question. The judges all thought that the circumstance that the conveyance was a conveyance of all the bankrupt's property, with only a small exception, was evidence on which the jury might properly find the conveyance to be a fraudulent conveyance made with intent to delay the creditors, notwithstanding that the conveyance was to secure a debt of such an amount that there was an ample surplus left in the equity of redemption. Jervis C.J., however, pointed out that a conveyance of the whole of a man's property would almost necessarily delay his creditors, and that as a man must be taken to intend the necessary consequences of his acts, the question whether such a conveyance was a fraudulent conveyance made with intent to delay creditors was scarcely a question to be left to a jury. It is interesting to notice that a few months before Baron Parke, in the Court of Exchequer, in *Young* v. *Waud* (2) had laid it down that a transfer of property which must necessarily in its results be known to the bankrupt to lead to the delay of the creditors is an act of bankruptcy, on the principle that a man is bound to contemplate the necessary result of his own acts. In *In re Wood* (1) James and Mellish L.JJ., sitting as a Court of Appeal in Bankruptcy, had to deal with s. 6 of 32 & 33 Vict. c. 71, which made it an act of bankruptcy for the debtor to make a fraudulent transfer of his property or of any part thereof. The words are the same as the words of the present Act. It will be observed that the words of intent, which appeared in previous Acts, are absent, and a great part of the argument turned on the absence of those words. But Mellish L.J. points out that where the question was whether a transfer was made fraudulently with intent to defeat or delay creditors, the practice was not to leave the question of intent to the jury; that there were various classes of conveyances which the Court held to be fraudulent, some of which he enumerates, but that in all such cases the law assumed the transfer to be made with intent to defeat or delay, since that result was the necessary consequence. This accords entirely with the law as one would expect to find it after the weighty pronouncements made nineteen years earlier in *Smith* v. *Cannan*. (2) The actual decision was that a transfer of the whole of a bankrupt's property to secure a past debt was a fraudulent transfer, and the decision is all the more significant in that it reversed the decision of the judge below, who considered that the security had been given in good faith, and for a valuable, though past, consideration. The transfer was held to be a fraudulent transfer on the ground that its necessary consequence, whether intended or not, was to delay creditors, because it prevented other creditors from issuing effective execution. This appears from the language used by Mellish L.J. (3) Of course, as was pointed out by James L.J. in *Ex parte King* (4), there might be some further fact which would prevent a transfer of the whole of a man's property to secure a past debt having as a necessary consequence the defeat or delay of his creditors, as, e.g., if, upon the transfer, there were a further advance obtained with a bona fide intention

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(1) 2 E. & B. 35, 42, 43.

(2) (1852) 8 Ex. 221.

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(1) L. R. 7 Ch. 302, 306.
(2) 2 E. & B. 35, 42, 43.
(3) L. R. 7 Ch. 308.
(4) 2 Ch. D. 256, 262.

CLAUSON J.

1930

SIMMS, *In re.*

of carrying on the business. This was, in fact, the position in *Ex parte Ellis* (1), where Mellish L.J. took occasion to point out quite clearly once again that an assignment of a debtor's whole property as security for a past debt without more would be an act of bankruptcy, whatever the motives of the parties might have been; the reason of course being that such an assignment would necessarily delay the other creditors.

I must go next to two cases which came before the Appeal Court (Cotton, Bowen and Fry L.JJ.) in March, 1884. In *Ex parte Chaplin* (2) the Court had to deal with a type of fraudulent transfer which differed from those dealt with in the cases already cited, in that it was not a case of the transfer of the assignor's whole property by way of security, but was, as the Court found, though on the face of it the document bore a different character, a transfer of the whole of the bankrupt's property to a creditor in consideration of the creditor releasing his own debt and agreeing to pay off all the assignor's other creditors.

The transfer was thus not by way of security but by way of sale. Cotton L.J. held the transfer fraudulent, on the ground that it withdrew all the debtor's property from the reach of his creditors so as to prevent them from enforcing their legal rights and remedies without the debtor obtaining anything which could be a substitute or equivalent for the creditors; and he pointed out that the transfer was fraudulent whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors. Bowen L.J. takes the same ground, and holds that while the transferees had no intention of defrauding the creditors, they intended to do that, the necessary result of which was to delay them. Fry L.J. dealt with the case under the Statute of Elizabeth. *Ex parte Johnson* (3) was a case of a mortgage to secure an existing debt and a further advance, and the transfer was held not to be fraudulent because, though the transfer included the whole of the debtor's property, the

(1) 2 Ch. D. 797, 798.

(2) 26 Ch. D. 319.

(3) 26 Ch. D. 338.

further advance was made to enable the debtor to carry on his business, and with a reasonable belief that it would have that effect. This case was recognized in the Privy Council in the very similar case of *Administrator-General of Jamaica* v. *Lascelles, de Mercado & Co.* (1), as correctly laying down the law.

In *In re Carl Hirth* (2) the Appeal Court held that the transfer of part of the bankrupt's property (the evidence as to whether or not the whole was transferred seemed to Lindley L.J. to be of doubtful sufficiency) to a company in which he held substantially all the shares, in return for an issue of fully paid shares and an agreement by the company to pay his debts, was in the particular circumstances of the case fraudulent as being a juggle and a fraud. In *In re Sharp* (3) a transfer of the bankrupt's whole property for a sum which was to be applied in paying the creditors was held to be fraudulent, though there was no fraudulent or improper motive, as necessarily tending to defeat any creditors (and there were in fact some) who were not paid, and as necessarily tending to substitute for the administration of the estate in bankruptcy a different mode of administration. In *In re Slobodinsky* (4) a transfer by the bankrupt to a company was held to have been made in circumstances of very clear fraud, and accordingly to be an act of bankruptcy.

In *In re David and Adlard* (5) a transfer of a bankrupt's business to a company in good faith for shares and debentures was held by Horridge J. to be a fraudulent transfer, and as such an act of bankruptcy, because it tended to defeat and delay any creditors who wished to enforce their rights against the bankrupt's estate. In that case the learned judge considered a decision of Bigham J. in *In re Harris* (6), in which a conveyance to a company for debentures was upheld, and treated that decision as a case in which the consideration given was treated as providing, in fact, something which the creditors, in order to obtain payment of their debts, could reach just as easily (and, I suppose, satisfactorily) as the assets for which the consideration was substituted.

(1) [1894] A. C. 135.
(2) [1899] 1 Q. B. 612.
(3) 83 L. T. 416.
(4) [1903] 2 K. B. 517.
(5) [1914] 2 K. B. 694.
(6) 14 Man. 127.

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1930
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The result of these authorities appears to me to be that a transfer by a debtor of substantially the whole of his property, whether by way of charge or by way of sale, will be an act of bankruptcy, if the necessary consequence of the transfer will be to defeat or delay his creditors; and, with these authorities to guide me, I feel no difficulty in holding that the substitution, in place of a going business and substantial business assets, of (*a*) shares in a private company which has taken over the debtor's assets and liabilities together with (*b*) a right of action by the debtor against that company on its covenant to discharge his liabilities, must necessarily have the result of delaying the creditors, and cannot be treated as providing something which the creditors can reach just as easily and satisfactorily as the assets which have been transferred. The fact that it was in the contemplation of all parties that further finance should be secured by placing a prior charge on the transferred assets, certainly makes the position no better for those who seek to argue that the creditors will not be delayed. It follows that I must hold the sale effected by the agreement of January 9, 1929, to be a fraudulent transfer and an act of bankruptcy. From this it results that the trustees' title overrides that of the company, and that the property which was the subject-matter of the agreement must be treated as having continued to be the property of the debtor and to have vested in the trustee, with the consequence that the company must account in the usual way for all such property, or the proceeds of it which have come to the hands of the company or any agent of the company. Whether the receiver was such an agent is a matter which I cannot determine in his absence.

It was, however, suggested that in some way or other the company could claim the protection of s. 45 of the Act of 1914. As I understood the argument in its final shape it was admitted (as indeed, in this Court, in view of *In re Jukes* (1) and *In re Carl Hirth* (2) it was necessary to admit) that that section must be read as protecting bona fide transactions

(1) [1902] 2 K. B. 58.

(2) [1899] 1 Q. B. 612, 622, 625.

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only, as indeed is indicated by the marginal note which appears, I understand, on the Parliament Roll, and accordingly seems to form part of that which has been enacted by Parliament. I am afraid that I failed to appreciate how the company, having been a party to a transaction which is held to be a fraudulent transfer, with not only notice but knowledge of all the facts which carry this legal result (the knowledge of the debtor and his solicitor, who were the only directors, being necessarily the measure of the company's knowledge) can set up bona fides as a defence. The suggestion I think was that all the parties honestly thought that this transfer which the law holds—and they must be assumed to have known that the law would hold—to be fraudulent, was the best thing in every one's interests. But I can rely on the authority of Cotton L.J. in *Ex parte Chaplin* (1) for the proposition that a fraudulent transaction remains a fraudulent transaction (at all events if the parties know all the facts which stamp it in law as a fraudulent transaction) whatever may be the view of the parties that it may be the best thing for the debtor, or may result in effectually paying the creditors. That authority alone makes it impossible for me to accede to the argument which would claim protection for the company in the present case on the footing of bona fides.

In the view of the law which I have stated, I must on this motion declare that the agreement in question was a fraudulent transfer, as necessarily tending to delay the bankrupt's creditors, and was accordingly an act of bankruptcy. I prefer, in this particular case, this form of declaration to that adopted in *In re Dombrowski.* (2) I will go on to declare that the whole of the assets comprised in the said agreement form part of the assets of the bankrupt divisible among his creditors and vest in the applicant. I will then order (following the form in *In re Dombrowski* (3)) that the respondents William Simms Limited do deliver up to the trustee, or account to him for such of the said assets as

(1) 26 Ch. D. 319.

(2) 8 B. & C. R. 32.

(3) 8 B. & C. R. 41.

have come to the hands of the said respondents or any person by the order or for the use of the said respondents and the proceeds of sale thereof, and that all such accounts as may be necessary be taken before one of the Registrars of this Court. The order will be that the trustee's costs be paid by the respondents, that is to say the company and the Bank, and the Bank must pay the trustee's costs of the Bank's application to be added as parties, if provision has not already been made for those costs.

There are certain further points with which I must deal. The Bank suggested that they or the respondent company ought to be recouped, or to have credit for moneys expended in paying in full certain of the bankrupt's creditors. My order will not prevent the respondents setting up any claims to prove which they or either of them may desire to set up; but I fail to see how any lien for, or claim for payment in full of, any moneys so expended can be established. A somewhat similar point was raised in *Ex parte Chaplin* (1), and the way in which Cotton L.J. dealt with the matter seems to justify me in leaving the matter in the way I do.

Then a question was raised whether the trustee ought not to be ordered to give up the shares which were received as consideration for the transfer. I did not clearly appreciate either what it was desired that he should do with the shares or the legal ground on which one party to the fraudulent transaction could base a claim to get back that which was handed over as part of the fraudulent transaction. Nor did I appreciate how it was proposed to get over the statement of the law expressed by Warrington L.J. in *In re Gunsbourg*. (2) However, as it was doubtful whether the point was of any practical moment, it was arranged to leave the matter over for further discussion. In order to register this, the order will reserve to the respondents William Simms Limited special liberty to apply as to the shares in that company now standing in the name of the trustee.

There may, notwithstanding my decision that the transfer to the company must be set aside, be a question between the

(1) 26 Ch. D. 319.

(2) [1920] 2 K. B. 426, 447.

parties whether the Bank who on paying off to Barclays the bankrupt's overdraft took over from Barclays the bankrupt's title deeds deposited with Barclays by way of security, can claim a charge upon the premises comprised in those deeds. It is a question which may entail a consideration of *In re Goldburg* (1) and possibly *In re Connolly Brothers, Ld.* (*No.* 2). (2) But as the parties desire that this point should be kept open, I do not propose to deal with it now. This will be recorded by inserting in the order special liberty to the respondents Lloyds Bank to apply as they may be advised in regard to any property comprised in such documents of title, if any, as stood deposited with them on January 9, 1929.

Solicitors: *Stafford Clark & Co.*; *Adler & Perowne.*

H. C. H.

In re COLLIER.

[709 of 1891.]

CLAUSON J.
1930
March 31;
April 1.

Bankruptcy—Husband and Wife—Policy of Assurance by Husband "for benefit of wife"—Construction—Death of Wife before Husband—Interest of Husband in Policy—Married Women's Property Act, 1870 (33 *&* 34 *Vict. c.* 93), *s.* 10.

In the year 1876 a husband during the lifetime of his wife took out a policy on his life with an assurance company, whereby, after a recital that the assured "for the benefit of his wife" in pursuance of the Married Women's Property Act, 1870, had proposed to the company to effect an assurance on his own life for 500*l.*, in consideration of the payment of the premiums during the life of the assured, the company covenanted that the property of the company should be liable to pay to the executors, administrators and assigns of the assured the sum of 500*l.*

In 1918 the wife died and in 1929 the husband died without having married again. In 1891 the husband was adjudicated bankrupt and obtained his discharge as from April 14, 1899:—

Held, that upon the true construction of the policy and s. 10 of the Married Women's Property Act, 1870, the interest in the policy moneys vested in the husband and upon his adjudication in the trustee in his bankruptcy subject to the trust in favour of his wife which enured for her benefit only if she survived her husband; with the result that as she died before her husband and before the fund fell into possession, the policy moneys belonged and were payable to the trustee in bankruptcy.

In re Browne's Policy [1903] 1 Ch. 188 applied.

Robb v. *Watson* [1910] 1 I. R. 243 approved.

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(1) [1912] 1 K. B. 384.

(2) [1912] 2 Ch. 25.

Semble, Sect. 10 of the Married Women's Property Act, 1870, does not enable a husband to confer the benefit of the policy upon any wife who does not by surviving him become his widow.

MOTION IN BANKRUPTCY.

On February 10, 1876, Walter Collier, whose wife whom he had married in September, 1875, was then living, took out a policy on his life with a company now represented by the National Mutual Life Assurance Society. By the policy, after a recital that the assured "for the benefit of his wife" in pursuance of the Married Women's Property Act, 1870, had proposed to the company to effect an assurance on his own life for 500*l.*, the company in consideration of the payment of the premiums during the life of the assured, covenanted that the property of the company should be liable to pay to the executors, administrators and assigns of the assured the sum of 500*l.*

On November 22, 1918, Mrs. Collier died intestate, and on August 5, 1929, Walter Collier died without having married again. He had, on July 17, 1891, been adjudicated bankrupt and had obtained his discharge as from April 14, 1899.

This was a motion by the trustee in the bankruptcy of Walter Collier for a declaration that the policy moneys payable on the death of the bankrupt formed part of the property of the bankrupt then vested in the trustee and divisible amongst his creditors. The respondents were the personal representatives of the late Mr. Collier and of his deceased wife.

W. N. Stable for the trustee in bankruptcy. Although not a binding authority on this Court, *Robb* v. *Watson* (1) is directly in point. The rights under the policy were (subject to a trust for the benefit of his wife created by s. 10 of the Married Women's Property Act, 1870 (2)), vested in the husband, and upon his bankruptcy became vested in the trustee. The husband at the date of his bankruptcy had an interest in the policy contingent on his not being survived by a widow entitled to the benefit of the statutory trust: *Cleaver* v. *Mutual Reserve Fund Life Association*. (1) Apart from the section, no trust for the wife is created: *In re Engelbach's Estate*. (2) It is essential that the assured's wife in order to take should become his widow: *In re Browne's Policy* (3); *In re Parker's Policies* (4); *Robb* v. *Watson*. (5) In *In re Griffiths' Policy* (6) there are special words: "for the benefit of his wife 'or if she be dead,' between his children in equal proportions," words which indicated an intention to exclude a second wife. *Prescott* v. *Prescott* (7) is a case where a wife insured her life in favour of her husband named in the policy, and it was held that the trust created in his favour was not dependent on his surviving his wife and that the rights thereunder belonged to his representatives.

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(1) [1910] 1 I. R. 243.

(2) Sect. 10: ". . . . a policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate."

In that case the husband had paid the premiums; the covenant was to pay William Prescott his executors, administrators or assigns. It was there held that there was an executed trust of the policy at once in favour of William Prescott. That case is distinguishable from the present case; or if undistinguishable was wrongly decided and conflicts with the principles laid down in the English cases. North J. in *In re Seyton* (8) construed the policy apart from the language of the Act of 1882 and held that the wife and children took as joint tenants. There is nothing in that decision to show that it is not essential that the wife should survive in order to take. The result of holding that the wife who predeceased the assured takes an indefeasible interest would be to exclude an after-taken wife who survived.

G. H. Beyfus for the respondents. Here, the trust being executed, all that the Court has to do is to construe

(1) [1892] 1 Q. B. 147.
(2) [1924] 2 Ch. 348.
(3) [1903] 1 Ch. 188.
(4) [1906] 1 Ch. 526.
(5) [1910] 1 I. R. 243.
(6) [1903] 1 Ch. 739.
(7) [1906] 1 I. R. 155.
(8) (1887) 34 Ch. D. 511.

the trusts of the policy. It is a trust simply "for the benefit of his wife." The trust is not expressed to be contingent on her surviving her husband. In *In re Davies' Policy Trusts* (1) Chitty J. preferred the view expressed by North J. in *In re Seyton* (2), that under the words "for the benefit of his wife and children" the wife took as a joint tenant with the children and not as tenant for life, as he (Chitty J.) had held in *In re Adam's Policy Trusts.* (3) In the case of a class, the members of which are joint tenants, title by survivorship follows as a matter of course. In *In re Browne's Policy* (4) Kekewich J. held that a married man when speaking of his wife must prima facie mean his wife at that time. Upon the construction of this policy, Mrs. Collier (since deceased) was the person intended by the assured to take the benefit of the policy. It is submitted that the actual decisions in *In re Browne's Policy* (4) and *Robb* v. *Watson* (5) are wrong; or, at any rate, the former is distinguishable from the present case, the trust there being for a class—namely, of his wife and children, while here it is for the benefit of his wife only. The decision in *Prescott* v. *Prescott* (6) is in favour of the deceased Mrs. Collier and is to be preferred to *Robb* v. *Watson.* (5) *In re Griffith's Policy* (7) also is in her favour, as it was held there that the wife referred to in the policy was the wife the assured had at the time and not an after-taken wife who survived him. In *In re Parker's Policies* (8) the policy was for the benefit of the "widow" of the assured and therefore, whether the term meant his then present wife if she should survive and become his widow or an after-taken wife who should become his widow, on either footing, that case is distinguishable from the present, where the trust is for his wife.

CLAUSON J. [after stating the facts, continued:] Apart from the Married Women's Property Act, 1870, which was the Act in operation when the policy was effected, the legal effect of the policy was simply to bind the insurance company to pay 500*l.* to the personal representatives or the assigns of the assured: no interest was conferred by the policy upon the then existing or any future wife of the assured: *Cleaver* v. *Mutual Reserve Fund Life Association.* (1) But the policy was expressed to be made in pursuance of the Act of 1870, which is still in force in the case of policies effected under that Act. Sect. 10 is the important section, and is as follows: [His Lordship then read s. 10 of the Act, and continued:] The corresponding section, s. 11, of the Married Women's Property Act, 1882, was considered in the case I have already cited; and, having regard to the view expressed by the Court of Appeal in that case, I must hold that the effect of s. 10 of the older Act was that the right to payment of the policy moneys formed part of the estate of the husband subject only to the trust in favour of the wife declared by the policy made in pursuance of the statute; but the operation of the policy in her favour continued only so long as the object of the trust remained.

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(1) [1892] 1 Ch. 90.
(2) (1887) 34 Ch. D. 511.
(3) (1883) 23 Ch. D. 525.
(4) [1903] 1 Ch. 188.
(5) [1910] 1 I. R. 243.
(6) [1906] 1 I. R. 155.
(7) [1903] 1 Ch. 739.
(8) [1906] 1 Ch. 526.

The first question to be decided is, Who is the person for whose benefit the policy was taken out? In the present case, it is expressed to be for the benefit of the wife of the assured. Upon the proper construction of the words "for the benefit of his wife" and having regard to the object which the assured must have had in view, that person was the wife of the assured who was in existence at the time when the moneys fell to be paid under the terms of the policy, that is to say, on the death of the assured. I am guided to this conclusion by the decision of Kekewich J. in *In re Browne's Policy.* (2) The headnote to that case reads as follows: "A man who had a wife and children, effected a policy of assurance on his life under the Married Women's Property Act, 1882, s. 11. The policy was expressed to be 'for the benefit of his wife and children.' The wife died, and the man married again and had a child by his second wife. On his death:—Held, that the widow and her child were entitled to participate jointly with the children of the first marriage." The learned judge had to decide whether the second wife was within the description of the wife mentioned in the policy. Kekewich J. said (1): "Regarding the case apart from the language of the Married Women's Property Act, 1882, one is met by the presumption, which is rather one of common parlance and common sense than of law, though it has been recognised by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death, and the observation holds good respecting allusions by another to a given man's wife. But, in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision."

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(1) [1892] 1 Q. B. 147.

(2) [1903] 1 Ch. 188.

The object of the Act of 1870 being to enable a husband to provide for his widow on his death, I am of opinion that the words "for the benefit of his wife" mean for the benefit of his wife who should survive the assured and become his widow; and I so hold.

The facts are that Mr. Collier was in 1891 adjudicated bankrupt, that in 1918 Mrs. Collier died, and that her husband survived her and died in 1929 without having married again, whereupon, in view of my construction of the policy, the moneys which were payable thereunder to the husband's executors, administrators or assigns belonged to the person in whom the rights under the policy were then vested, subject to the interest of the husband's widow, if any.

In view of the arguments placed before me I ought to express my opinion on a further point. Assuming I am wrong in the construction I have put upon this policy, and that upon its proper construction, the words "his wife" mean the person who at the date when the policy was taken out was the wife of the assured, the question then arises, does the Act of 1870 enable a husband to create a trust for the benefit of a person who does not live to become his widow? In my opinion, the

(1) [1903] 1 Ch. 190.

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Act is aimed at enabling provision to be made for a widow and is so framed as not to give a husband power to confer the benefit of the policy upon any wife, unless she by surviving her husband becomes his widow. That view is involved in the decision in *Robb* v. *Watson.* (1) But it was suggested that my view and the decision in that case are inconsistent with the decision in another Irish case—namely, *Prescott* v. *Prescott* (2), where a wife in pursuance of the Married Women's Property Act, 1882, effected a policy on her own life in favour of William Prescott, who was the husband of the assured at the date of the policy, and the insurers contracted to pay on her death to William Prescott or his executors' administrators or assigns the policy moneys: and it was held that as soon as the policy was effected the interest in the moneys assured vested absolutely in William Prescott and was not contingent upon his surviving his wife. I confess that I find a difficulty in following the grounds on which that case was decided; and if the decision in that case is inconsistent with that in *Robb* v. *Watson* (1), and I have to make a choice between the two, I prefer the decision in *Robb* v. *Watson.* (1)

In my view therefore, when the assured became bankrupt in 1891 his interest in the moneys to become payable under the policy upon his death was an absolute interest subject only to a trust of those moneys in favour of any wife who should by surviving him become his widow. In the events which happened the assured died leaving no widow; with the result that the policy moneys are payable to the trustee in bankruptcy of the assured.

Solicitors: *Tarry, Sherlock & King; Morgan, Price, Marley & Rugg.*

(1) [1910] 1 I. R. 243. (2) [1906] 1 I. R. 155.

H. C. H.

Dictum of Maugham, J., at p. 47, *applied.* Jones *v.* Bellegrove Properties, Ltd. [1949] 2 All E.R. 198.

MAUGHAM
J.

1930

March 24, 25.

In re THE COLISEUM (BARROW), LIMITED.

[00113 of 1929.]

Company—Winding up—Proof for Directors' Fees—Rejection in respect of Fees due more than six years—Balance sheets signed by Directors at Board Meetings—Directors as agents for Company and creditors for Fees—Balance sheets not acknowledgments of liability for Fees—Statute of Limitations, 1623 (21 *Jac.* 1, *c.* 16)—*Lord Tenterden's Act,* 1828 (9 *Geo.* 4, *c.* 14), *s.* 1—*Mercantile Law Amendment Act,* 1856 (19 *&* 20 *Vict. c.* 97), *s.* 13—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 113.

Balance sheets including fees due to directors, and signed by directors pursuant to s. 113 of the Companies (Consolidation) Act, 1908, are not acknowledgments of those fees within Lord Tenterden's Act.

After an order for the compulsory winding up of the company the applicant put in a proof for 950*l.* in respect of director's fees. The liquidator rejected the proof to the extent of 350*l.*, allowing only 600*l.*, on the ground that all directors' fees which had accrued due more than six years before the date of the winding-up order were barred by the Statute of Limitations. The director's fees due to the applicant appeared from balance sheets duly signed by two directors and passed by the company. Upon a summons taken out by the applicant asking that the decision of the liquidator rejecting his proof to the extent of 350*l.* might be reversed, and that the proof might be allowed in the full sum of 950*l.* :—

Held (i.), that a board of directors, acting as a board, and passing a resolution adopting a balance sheet which includes directors' fees, does not bind the company to pay those fees ;

(ii.) That a balance sheet so adopted and signed by directors pursuant to s. 113 of the Companies (Consolidation) Act, 1908, is not a written promise by the company or its agents to pay the directors' fees.

Green v. *Humphreys* (1884) 26 Ch. D. 474 referred to.

Summons.

The Coliseum (Barrow), Ld. (hereinafter called "the company"), was registered in August, 1913, under the name of C. & M. Rutledge, Ld., and by a special resolution passed and confirmed at extraordinary general meetings held in February, 1928, its name was changed to The Coliseum (Barrow), Ld. During a period of several years when the company was making trade losses, the directors guaranteed its bank overdraft, and also made cash advances to it : and, in order to help in its affairs, they allowed their remuneration as directors to stand over and to remain a debt due from the company to them. March 31, 1919, was the last occasion upon which they received remuneration in fees.

On March 25, 1929, an order for the compulsory winding up of the company was made. From 1919 to that date the amounts due to directors in respect of unpaid fees were shown from year to year in the company's balance sheets, each of which was duly signed by two of the directors. The balance sheets were in each year duly presented by the directors to the shareholders at the annual general meetings, and were duly passed by the company. The applicant on this summons, a director, who had been present at each of the meetings at which balance sheets were adopted, presented to the liquidator a proof for 950*l.*, being the amount due to him in respect of director's fees at the date of the winding up. The liquidator admitted the proof for only 600*l.*, rejecting the full proof on the ground that all directors' fees which accrued due more than six years before the date of the winding-up order were barred by the Statute of Limitations. By this summons the applicant asked that the decision of the liquidator rejecting his proof to the extent of 350*l.* might be reversed, and that the proof might be allowed in the full sum of 950*l.* The amount which appeared in the last balance sheet to be due to directors in respect of fees was well over 3000*l.*, and it was arranged that this summons should be treated as a test summons, the proofs of the other directors standing over for the time being.

E. W. Lavington for the applicant. The balance sheets showing the fees due to directors, and signed by two directors, amount to an acknowledgment which complies with s. 1 of Lord Tenterden's Act, 1828, and s. 13 of the Mercantile Law Amendment Act, 1856, and which therefore takes the case out of the operation of the Statute of Limitations. (1)

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(1) Lord Tenterden's Act, 1828, s. 1: ". . . . in actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them (i.e., the Statute of Limitations and an Irish Act, 10 Cha. 1, sess. 2, c. 6) or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

Mercantile Law Amendment Act, 1856, s. 13. "In reference to the provisions of the Acts of the ninth

[He referred to *Tanner* v. *Smart* (1); *Spencer* v. *Hemmerde* (2); *In re Beavan* (3); *In re Emmett* (4); *Lloyd* v. *Coote & Ball* (5); *Lowndes* v. *The Garnett and Moseley Gold Mining Co. of America, Ld.* (6); *Stamford, Spalding and Boston Banking Co.* v. *Smith.* (7)]

Wilfrid M. Hunt for the liquidator. There is here no acknowledgment sufficient to get over the lapse of time. An acknowledgment, to take a case out of the statute, must be made to a creditor; *Stamford, Spalding and Boston Banking Co.* v. *Smith.* (7) *Lowndes* v. *The Garnett and Moseley Gold Mining Co. of America, Ld.* (6), is not a very satisfactory decision.

Lavington in reply. There was never any intention to prevent any class of persons from obtaining the benefit of the statute. If the contention put forward on behalf of the liquidator is correct, directors can never give an acknowledgment taking debts due to themselves out of the statute.

MAUGHAM J. This is a test summons taken out in order to ascertain whether directors' fees which have accrued due more than six years before the date of the winding up are statute barred or not. There is no doubt that, apart from certain acknowledgments alleged to be contained in balance sheets of the company and relied upon by the applicant, the Statute of Limitations (21 Jac. 1, c. 16) would operate and the rejection of his proof would be justified. The directors have behaved exceedingly well, and when the company was in difficulties they ceased to exact their fees. The balance sheets were duly passed by the company.

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year of the reign of King George the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of Her present Majesty, chapter one hundred and thirteen, sections twenty four and twenty seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself."

(1) (1827) 6 B. & C. 603.
(2) [1922] 2 A. C. 507.
(3) [1912] 1 Ch. 196.
(4) (1907) 95 L. T. 755.
(5) [1915] 1 K. B. 242.
(6) (1864) 33 L. J. (Ch.) 418.
(7) [1892] 1 Q. B. 765, 769.

The Statute of Limitations contains no provision keeping alive by acknowledgment a claim liable to be barred thereunder: but the Courts have from time to time held (on grounds which have been criticized; see Pollock on Contracts, 9th ed., p. 694), that if there has been a promise to pay after the six years or during the course of the six years that promise to pay gives rise to a new cause of action (1), and that certain acknowledgments to creditors may, on their true construction, amount to promises to pay. By s. 1 of Lord Tenterden's Act, 1828, it is provided that [his Lordship read the section, and continued:] By s. 13 of the Mercantile Law Amendment Act, 1856, it is provided that [his Lordship read the section, and continued:] It is now well settled that an acknowledgment will keep a debt alive only if it amounts to a fresh promise to pay (*Green* v. *Humphreys* (2)), and that the acknowledgment must be made to the creditor or to his agent: that is beyond dispute. In the present case the directors of the company, at various board meetings held from time to time, passed the balance sheets before them and two of them signed the balance sheets on behalf of the board pursuant to s. 113 of the Companies (Consolidation) Act, 1908. Accordingly, had the statement been made in the balance sheet that the company owed a specified sum to a shareholder to whom the balance sheet was sent in the usual way that would have amounted, I think, to a sufficient acknowledgment within the authorities. The difficulty in the present case is that the promise, if any, is a promise by the directors, as a board acting on behalf of the company, to pay to themselves the amount of the directors' fees, and it seems to me that this is not, in the circumstances, a promise to pay on behalf of the company. Having regard to the position which a director, as agent of the company, necessarily occupies in relation to the company, it would not have been competent action to the board, acting as a board, to authorize the giving

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(1) [In *Spencer v. Hemmerde* [1922] 2 A. C. 507 Lord Sumner, on a full review of the authorities, at pp. 520–525, was of opinion that there is not a new cause of action but a revival of the original one.—F. P.]

(2) 26 Ch. D. 474.

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of a definite promise to pay to themselves. They would all have been interested in the matter, and so would have been incapable of passing the resolution so as to bind the company.

Accordingly I must hold that the balance sheets in question do not amount to acknowledgments in writing within Lord Tenterden's Act, and the claim must fail.

Solicitors: *Barnard, Taylor & Douglas-Mann; Hugh V. Harraway.*

K. R. A. H.

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1930 *Jan.* 29, 30; *Feb.* 12.

In re BOLTON.

Ex parte NORTH BRITISH ARTIFICIAL SILK, LIMITED.

[992 of 1928.]

Bankruptcy—Proof—Shares in Company—Application for Shares—Defaulting Shareholder—Forfeiture of Shares by Company under Articles of Association—Loss sustained by Company on Reallotment—Bankruptcy of Shareholder—Company's Right of Proof for Unpaid Instalments—Rejection of Proof by Trustees in Bankruptcy—Validity of Forfeiture under Company's Articles—Quantum of Damage—Actual Loss sustained by Company.

Where a company in pursuance of its articles of association has forfeited shares for non-payment of moneys due on allotment and calls, and the articles provide that notwithstanding forfeiture the ex-shareholder shall be liable to pay all calls or other money owing upon the shares at the time of the forfeiture, and the shares are subsequently sold and reallotted to other persons with the result of a loss to the company, the company on the subsequent bankruptcy of the ex-shareholder is only entitled to prove for the actual loss suffered, that is the difference between the amount received on the reallotment of the forfeited shares and the amount due at the date of the forfeiture.

Any payment of the uncalled capital by the new allottees must enure for the benefit of the original allottee who has forfeited the shares and release him pro tanto in respect of the damages for which his breach of contract in failing to pay the calls rendered him liable.

The principle laid down in *In re Randt Gold Mining Co.* [1904] 2 Ch. 468 considered and applied.

MOTION.

This was a motion by the North British Artificial Silk, Ld. (hereinafter called "the company"), by way of appeal against the rejection of their claim as creditors to prove against the estate of one James B. Bolton, a bankrupt.

The company was incorporated on February 25, 1928, with a capital of 385,000*l*, divided into 345,000 participating preferred ordinary shares of 1*l*. each and 800,000 deferred ordinary shares of 1*s*. each. Shortly after the registration an issue was made to the public of the whole of the participating preferred ordinary shares and 345,000 of the deferred ordinary shares. The preferred shares were underwritten, and among the underwriters was a Mr. J. B. Bolton, who underwrote two blocks of these shares—namely, 10,000 and 2000 respectively. The terms of the offer provided that 2*s*. 6*d*. per share should be payable on application, 5*s*. per share on allotment, 5*s*. per share on April 16, 1928, and the remaining 7*s*. 6*d*. per share on August 31, 1928. J. B. Bolton paid on his application the sum of 1250*l*. in respect of the 10,000 shares, and 250*l*. in respect of the 2000 shares.

The public issue was not a success, and J. B. Bolton was allotted in respect of his underwriting 8200 and 1640 shares respectively. On the allotment to him of the 8200 shares there then became due the sum of 1825*l*., being the difference between 3075*l*. the total sum due on application and allotment and the sum of 1250*l*. which he had already paid. In the same way on the allotment of the 1640 shares there became due in respect thereof the sum of 365*l*., being the difference between 615*l*. the total sum due on application and allotment and the sum of 250*l*. already paid. The 1640 shares were shortly after allotment divided into three smaller lots of 820, 410 and 410 shares respectively.

The two lots of 410 shares were ultimately paid up in full, but J. B. Bolton made default in paying the balances due on allotment in respect of the 8200 and the 820 shares. Application was made from time to time by the company for payment of these balances and also for the instalments which fell due on April 16, 1928. Ultimately on June 15, 1928, the secretary of the company wrote to him enclosing what was described as a notice of forfeiture. The notice

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claimed 4375*l.* 15*s.* as due for allotment and call moneys in respect of 9020 preferred ordinary shares—namely, the 8200 and the 820 shares. This sum was made up of (*a*) the sum of 1825*l.* due on allotment in respect of the 8200 shares; (*b*) the sum of 182*l.* 10*s.* due on allotment in respect of the 820 shares (that was one-half of the said sum of 365*l.* already mentioned with reference to the 1640 shares); (*c*) the sum of 2255*l.* for the call due on April 16 of 5*s.* per share in respect of the whole 9020 shares, and (*d*) the sum of 113*l.* 5*s.* for interest at the rate of 10 per cent. per annum from the respective dates when the moneys became due on the whole of the 4262*l.* 10*s.* for allotment and call moneys. No payment was made, and on August 31 a further call of 7*s.* 6*d.* per share became due.

On October 11, 1928, the directors of the company passed a resolution forfeiting the 8200 shares pursuant to article 32 of the company's articles of association. The remaining 820 shares were not forfeited because arrangements were made later on for the payment of the allotment and call moneys due thereon and from that time nothing further arose with regard to them.

After the forfeiture the company reallotted the 8200 shares as paid up to the extent of 2*s.* 6*d.* per share on the terms that the remaining 17*s.* 6*d.* per share was to be paid by the new allottees in respect of 8150 shares and 20*s.* per share was to be paid in respect of 50 of the said shares. These sums were paid by the new allottees. The company however in order to obtain these new allottees paid a total sum on these shares of 1018*l.* 12*s.* 6*d.* by way of commission with the result that the company received the sum of 6162*l.* 12*s.* 6*d.* instead of 6950*l.*, being the sum due in respect of the 8200 shares from J. B. Bolton at the date of the resolution authorizing the forfeiture—a deficit of 787*l.* 7*s.* 6*d.* To this last mentioned amount must be added the sum of 314*l.* 11*s.* 3*d.*, which was agreed to be the total amount of the interest at 10 per cent. per annum calculated from the respective dates when the various amounts comprised in the sum of 6950*l.* fell due for payment to the date of forfeiture.

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On November 16, 1928, a receiving order was made against J. B. Bolton (hereinafter called "the bankrupt"), and on April 29, 1929, he was adjudicated a bankrupt. On December 6, 1928, the company lodged a proof of debt against the bankrupt's estate for the sum of 7991*l.* 0*s.* 4*d.* This sum was in respect of the instalments claimed to be due from the bankrupt on the preferred ordinary shares applied for by him. It included the amount owing on the 820 shares, the sum due thereon being then still unpaid. The proof was consequently made up as follows:—

	£	s.	d.
9020 preferred ordinary shares of 1*l.* each . . .	9020	0	0
Less amount paid	1375	0	0
Leaving outstanding	7645	0	0
Add interest at 10 per cent. per annum to November 16, 1928	346	0	4
	7991	0	4

By a notice dated July, 12, 1929, the joint trustees of the bankrupt's estate rejected the company's proof on the following grounds: (1.) that the company had not supplied the required evidence in support of their claim and (2.) that the trustees were not satisfied that the bankrupt's estate was indebted for the amount claimed or any part thereof.

Correspondence ensued and ultimately the company moved the court by way of appeal against the rejection of their proof dated December 6, 1928, by the trustees of the bankrupt's estate and for an order that the trustees' decision might be reversed and the company's claim admitted for the full amount.

The motion came before Luxmoore J. on October 28, 1929, when after hearing evidence he dismissed the motion on the ground that the shares which formed the foundation of the proof had not been validly forfeited.

The company having subsequent to October 28, 1929, discovered further evidence which proved that the forfeiture was valid appealed to the Court of Appeal from this decision, and on the appeal coming on for hearing before that court the parties without discussion consented to the discharge of the order. The Court of Appeal directed that in the circumstances the motion should be remitted to Luxmoore J. for rehearing.

The motion came on for rehearing on January 29 when the court allowed the proof to be amended by substituting the sum of 7264*l.* 11*s.* 3*d.* (that was the 6950*l.* together with the 314*l.* 11*s.* 3*d.*) for the amount claimed, and by adding a proviso that the company should not receive by way of dividend more than 1101*l.* 18*s.* 9*d.*

The articles of the company's articles of association material to the determination of the question at issue were:—

Lien.

Article 29: "The company shall have a first and paramount lien on all shares other than fully paid shares and on the interest and dividends declared or payable in respect thereof for all moneys due to and liabilities subsisting with the company from or on the part of the registered holders thereof either alone or jointly with any other person including calls made although the times appointed for their payment may not have arrived and may enforce such lien by sale or forfeiture of all or any of the shares on which the same may attach. Provided that such forfeiture shall not be made except in the case of a debt or liability the amount of which shall have been ascertained and only so many shares shall be so forfeited as the auditors of the company shall certify to be the equivalent at their then value of such debt or liability."

Forfeiture of Shares.

Article 30: "If any member fail to pay any call or money payable under the terms of allotment of a share on the day appointed for payment thereof the directors may at any time while the same remains unpaid serve a notice on him requiring him to pay the same together with interest and any expenses that may have accrued by reason of such non-payment."

Article 31: "The notice shall name a further day on or before which such call or other money and all interest and expenses that have accrued by reason of such non-payment are to be paid and the place where payment is to be made . . . . and shall state that in the event of non-payment at or before the time and at the place appointed the shares in respect of which such payment is due will be liable to be forfeited."

Article 32: "If the requisitions of any such notice as aforesaid are not complied with any share in respect of which such notice has been given may at any time thereafter before payment of all moneys due thereon with interest and expenses be forfeited by a resolution of the directors to that effect. Such forfeiture shall not include any dividends declared in respect of the forfeited shares and not actually paid before the forfeiture."

Article 33: "Any share forfeited shall be deemed to be the property of the company and be held extinguished sold re-allotted or otherwise disposed of in such manner as the directors think fit and in case of re-allotment with or without any money paid thereon by the former holder being credited as paid up thereon. The directors may at any time before any shares so forfeited shall have been extinguished sold re-allotted or otherwise disposed of annul the forfeiture thereon upon such conditions as they think fit."

Article 34: "The holder at the time of forfeiture of a share which has been forfeited shall notwithstanding such forfeiture be liable to pay the company all calls or other money owing upon such share at the time of the forfeiture."

H. B. Vaisey K.C. and *G. F. Kingham* for the applicants. The rejection of the proof by the trustees was wrongful and it ought to be admitted for the amended amount. The forfeiture of the bankrupt's shares was perfectly valid under the company's articles of association.

The group of articles headed "Forfeiture of Shares" has given the company ample powers in regard to these shares and under the circumstances they have been properly forfeited. This case can be distinguished from *Hopkinson* v. *Mortimer, Harley & Co., Ld.* (1), and the company are not purporting to act under the article giving them a lien on the shares.

(1) [1917] 1 Ch. 646.

The disposal of these shares by the company cannot affect the company's right to prove in the bankruptcy and the reasons given by the trustees for their rejection should be disregarded.

W. N. Stable for the trustees in bankruptcy. The proof was rightly rejected. First the company is not entitled to prove for any sum at all. There has been no valid forfeiture of the shares, no auditor's certificate has been produced.

Article 29 cannot apply except in the case of calls. If it stood alone the company could have forfeited the shares and every word would apply to this case. The articles following do not contradict article 29, they merely provide an additional remedy.

The question is really whether there are two powers of forfeiture or only one. A forfeiture under article 29 may be ultra vires but it makes no difference. These shares have not been validly forfeited.

Alternatively and secondly the company can only prove (if at all) for the sum of 1101*l.* 18*s.* 9*d.* If a share is forfeited and the articles are silent as to the liability of the shareholder continuing after the forfeiture the company would get the shares back again and the liability of the shareholder is discharged. A contract to take shares is the same as any other contract, and if there is a breach by the allottee the company gets a right of action including a claim for damages or in case of the bankruptcy of the allottee can prove in the bankruptcy. Provision may be made for the payment of a particular sum as liquidated damages or for something in the nature of a penalty.

Article 34 is concerned with the payment of further sums after a forfeiture has been incurred, it is something in the nature of a penalty and would not be enforced by the Court. If the company has suffered any damage it can only recover the actual damage sustained. On the facts in the present case the only damage suffered by the company was in respect of this sum of 1101*l.* 18*s.* 9*d.*, and this is really the only sum for which they may be entitled to prove: compare *In re Blakely Ordnance Co. Stocken's* case (1) and *Ladies' Dress*

(1) (1868) L. R. 3 Ch. 412, 415.

Association v. *Pulbrook* (1), the principle of which cases was applied in *In re Darwen & Pearce.* (2) See also the case of *In re Randt Gold Mining Co.* (3), which it is submitted covers this point and which was the outcome of a previous decision in the House of Lords: sub nom. *New Balkis Eersteling, Ld.* v. *Randt Gold Mining Co.* (4)

Applying the ordinary principles of contract to the facts of this case, the actual damage sustained by the company is a sum slightly over 1000*l.* The company might not be able to get rid of the shares after a forfeiture, and if they did article 34 cannot be interpreted as meaning that the original holder is to remain liable notwithstanding the calls being paid by some one else. The right of the company is only to prove for the actual damage sustained by the bankrupt's failure to carry out his contract.

H. B. Vaisey K.C. in reply.

Cur. adv. vult.

February 12. LUXMOORE J. This is a motion by the North British Artificial Silk, Ld., for an order that the decision of the joint trustees in the bankruptcy of James Butler Bolton rejecting in toto the proof submitted on the company's behalf may be reversed. The proof as originally submitted on December 6, 1928, was for 7991*l.* 0*s.* 4*d.*, but at the hearing before me on January 29 last Mr. Vaisey on behalf of the company asked for leave to amend his proof. I allowed him to do so by substituting for the original amount claimed the sum of 7264*l.* 11*s.* 3*d.*, and by adding a proviso that the company should not receive by way of dividend more than 1101*l.* 18*s.* 9*d.*

The motion has been before me on two separate occasions. First, on October 28, 1929, when, after hearing the whole of the evidence then available and the arguments of Mr. Kingham for the company and Mr. Stable for the trustees, I dismissed the motion on the ground that the company had not on the evidence before me validly forfeited the shares which formed the foundation of their proof. The company appealed from my decision to the Court of Appeal on the ground that subsequent to the hearing before me further evidence had been discovered which established that the previous evidence was not accurate and that the fresh evidence showed that the forfeiture which I had held to be invalid was—so far as the ground on which I had decided the case was concerned—a valid forfeiture. Consequently when the appeal came before the Court of Appeal the parties consented without any discussion to the discharge of my order, and the Court directed that this matter should come back to me for rehearing and that I should deal with the costs of the original hearing and of the appeal.

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(1) [1900] 2 Q. B. 376, 381.

(2) [1927] 1 Ch. 176.

(3) [1904] 2 Ch. 468.

(4) [1904] A. C. 165.

The motion was reheard by me on January 29 last. There was then no dispute as to the facts. So far as material they are as follows: [His Lordship stated the facts.] Mr. Vaisey claims to prove for the total sum of 7264*l.* 11*s.* 3*d.*, that is the sum of 6950*l.* to which is added the 314*l.* 11*s.* 3*d.*, but, as I have already said, he submits to the limitation of his proof in such a way that the company is not to receive by way of dividend in respect of this sum more than 1101*l.* 18*s.* 9*d.*, that is, the 787*l.* 7*s.* 6*d.* and the 314*l.* 11*s.* 3*d.*

Mr. Stable, on behalf of the trustees in the bankruptcy, claims that the company is not entitled to prove for any sum at all or, alternatively, that his proof can only be admitted for the sum of 1101*l.* 18*s.* 9*d.* So far as the first claim is concerned he bases his argument on the company's articles of association and says that the company has not validly forfeited any of the 8200 shares, and that, as these shares have been disposed of by the company no claim can now be made in the bankruptcy in respect of any moneys due on them. The answer to the question whether the forfeiture of the 8200 shares by the company was valid or not depends on the construction of the relevant articles in the company's articles of association.

The articles to be considered are article 29 and articles 30 to 35 inclusive. Article 29 is headed "Lien." [His Lordship read the article in question.] This article is not one in general use. A similar article has been held to be invalid so far as any forfeiture for any debt or liability other than a liability for calls is concerned: *Hopkinson* v. *Mortimer, Harley & Co., Ld.* (1) The company has not in fact purported to act under this article, but Mr. Stable has argued that at any rate the proviso limiting the forfeiture to shares of a number certified by the auditors as of equivalent value to the liability in respect of which the forfeiture is made is of general application, and applies not only to a forfeiture purported to be made under article 29, but also to a forfeiture under any of the subsequent articles.

The subsequent articles numbered 30 to 35 inclusive form a group of articles comprised under a separate heading, "Forfeiture of Shares." Article 30 provides that, "if any member fail to pay any call or money payable under the terms of allotment of a share on the day appointed for payment thereof the directors may at any time while the same remains unpaid serve a notice on him requiring him to pay the same together with interest and any expenses that may have accrued by reason of such non-payment." It was under this article that the notice of June 15, 1928, was sent to the bankrupt. Article 31 provides that, "the notice shall name a further day on or before which such call or other money and all interest and expenses that have accrued by reason of such non-payment are to be paid and the place where the payment is to be made . . . . and shall state that in the event of non-payment at or before the time and at the place appointed the shares in respect of which such payment is due will be liable to be forfeited." It is admitted that the notice of June 15, 1928, complies with the requirements of this article. Article 32 provides for the forfeiture of any share (in respect of which a forfeiture notice has been given) by a resolution of the directors at any time before payment of moneys due thereon in case the requisitions of such a notice are not complied with. By article 33 a forfeited share becomes the property of the company, and the company is empowered to hold extinguish sell reallot or otherwise

(1) [1917] 1 Ch. 646.

dispose of a forfeited share in the manner the directors think fit, and in the case of reallotment with or without any money paid thereon by the former holder being credited as being paid up thereon. By article 34 the holder at the time of the forfeiture of the forfeited share is to remain liable for all calls or other money owing upon the share at the time of the forfeiture. Article 35 relates to the title of the purchaser or allottee of forfeited shares and is immaterial so far as this case is concerned.

This group of articles is in the usual and well known form. The company has purported to act under the powers in this particular group and not under article 29. It is admitted that all the steps required by this group of articles have been complied with and that if the proviso in article 29 cannot be read as being of general application to all forfeitures, whether under article 29 or the group of articles 30 to 35 inclusive, the forfeiture of October 11, 1928, was validly made. In my opinion on the true construction of the articles the proviso in article 29 is confined to a forfeiture to enforce a lien under that article and has no application to a forfeiture under the articles 30 to 35 inclusive. The power in articles 30 to 35 is obviously a separate and distinct power from that in article 29, and to my mind it would be contrary to all the rules of construction to read a proviso on a distinct power conferred for a distinct purpose by one article as applicable to an equally distinct power conferred for an equally distinct purpose by another group of articles in the same articles of association. I am satisfied that the forfeiture of the 8200 shares by the resolution of October 11, 1928, was a valid and effective forfeiture and I so hold.

It is therefore necessary to consider the alternative submission put forward by Mr. Stable. On October 11, 1928, it is admitted that there was due from the bankrupt to the company for calls and interest the total sum of 7264*l.* 11*s.* 3*d.* It is agreed that the company by its subsequent reallotment of the 8200 forfeited shares has in fact received 6162*l.* 12*s.* 6*d.* Mr. Stable has argued as his second line of defence that the only proof the company can make in the circumstances is for 1101*l.* 18*s.* 9*d.* Now it is admitted that if articles are silent as to the liability existing at the time of the forfeiture of a shareholder whose shares are forfeited the company on forfeiture gets its shares back and the shareholder who has had his shares forfeited is wholly discharged from his liability. To get over this difficulty an article to the effect of article 34 is almost invariably inserted in all modern articles of association. Mr. Stable has contended that notwithstanding these articles the company cannot in fact receive more than the actual damage it has suffered, that is the amount unpaid at the date of the forfeiture in respect of calls made and the liability in respect of uncalled capital together with the interest of which the company has been deprived by reason of the nonpayment. At the date of the forfeiture no doubt 7264*l.* 11*s.* 3*d.* was the total sum owing by the bankrupt on the two heads, but before the proof in the bankruptcy was put in the company had in fact received aliunde in respect of the 8200 shares the total sum of 6162*l.* 12*s.* 6*d.*, so that in fact the only damage suffered by the company by reason of the bankrupt's default is the sum of 1101*l.* 18*s.* 9*d.* Mr. Stable has contended that this is all that the company would have recovered against the bankrupt if the bankruptcy had not supervened and an action had been brought against him, and consequently this is the only sum for which proof can be admitted in the bankruptcy.

In my view this contention is sound. The application for the 8200 shares followed by the allotment of those shares to the bankrupt constituted a contract between him and the company, the terms of which are to be found in the prospectus and articles of association. If the contract is broken by the allottee the company is entitled to recover damages for the breach. The quantum of the damages is the same whether the appropriate relief is by action or proof in the bankruptcy. It is true the parties to the contract can always provide that the damage is to be a particular sum, and if they do so provide the question arises: "Is the agreement to pay the particular sum an agreement to pay liquidated damages or a penalty?" If the result of the agreement to pay a particular sum is that far more than the actual loss may be recovered, then the particular sum may be treated as a penalty and the excess over the actual damage may be irrecoverable. In the present case there is no agreement to treat the sum due at the date of the forfeiture as liquidated damages. The agreement in my view only provides that the liability of the shareholder, whose shares have been forfeited, is to remain with a limit of the liability to the amount due at the date of the forfeiture. In respect of this liability the company can recover the actual loss suffered not exceeding the limit fixed. In other words the company must give credit for all sums received or receivable in mitigation of the damage.

There is no reported case which covers the facts of the present case, but the converse appears to have been decided by Buckley J. in *In re Randt Gold Mining Co.* (1) But before I refer to the actual decision it will I think be convenient if I refer to another decision in connection with the same company which led up to that case. It is the *New Balkis Eersteling, Ld.* v. *Randt Gold Mining Co.* (2) The actual decision was that when shares which have been forfeited for non-payment of a call are sold and a certificate of proprietorship is given to the purchaser stating that he is to be deemed to be the holder of the shares discharged from all calls due before the date of the certificate, the purchaser is liable for payment of future calls. The shares in question, which were of the nominal value of 5*s.* each, had originally been allotted to the African Gold Properties Ld., and that company paid up 3*s.* 4*d.* on each share, the remaining 1*s.* 8*d.* was called up, and it was by reason of the failure of the African Gold Properties Ld. to pay this call that the forfeiture took place. The Randt Company having forfeited sold the shares to the appellant company, a certificate being issued stating that "the remaining 1*s.* 8*d.* per share has been called up and is payable by the African Gold Properties Ld. who were the holders of the said shares prior to the same being forfeited." After the sale to the appellant company the Randt Company made a call of 1*s.* 3*d.* per share in respect of the

(1) [1904] 2 Ch. 468, 472.

(2) [1904] A. C. 165, 170.

shares sold to the appellant company. The appellant company refused to pay, claiming that the liability was that of the African Gold Properties Ld., and, that they (the appellant company) were under no liability at all. Bucknill J., the Court of Appeal and the House of Lords all decided that the appellant company was liable to pay the call of 1*s.* 3*d.* Lord Lindley in the course of his judgment said this: "What would be the result if under a certificate of this kind, or proceedings of this sort, the Randt Company were endeavouring to raise more than 5*s.* per share, I do not know; but that point has not arisen. I can conceive that there might be difficulties then . . . . . The Randt Company are not attempting by this machinery to raise more money per share than they were by the Act authorised to raise." That decision was followed very shortly afterwards by a claim by the liquidator of the Randt Company (which had then gone into liquidation) against the New Balkis Company for 5*d.* per share in respect of the 1*s.* 8*d.* per share which the African Gold Properties Ld. had failed to pay at the date when the forfeiture became effective. Under the articles of the Randt Company the African Gold Properties Ld. remained liable for the unpaid calls of 1*s.* per share notwithstanding forfeiture. The Randt Company obtained from the African Gold Properties Ld. about 5*d.* per share on account of this liability. The New Balkis Company resisted the payment of the 5*d.* per share on the ground that the Randt Company had in fact received that sum from the African Gold Properties Ld. in respect of the same shares for which the 5*d.* liability was being sought to be enforced against it, and that if the 5*d.* per share was paid by the New Balkis Company, the Randt Company would in fact receive 5*s.* 5*d.* in respect of each of the shares of the nominal value of 5*s.*; and that although the African Gold Properties Ld. paid the 5*d.* after forfeiture and under the special contract contained in the article, yet the New Balkis Company was entitled to claim the benefit of that payment as being a payment on account of the outstanding calls. Buckley J. assented to that view, and I will read the material passage from his judgment. "The material question is not what was the character of the person who paid, but what was the character of the payment made. If the company have received payment of 5*d.* in respect of the 5*s.*, the nominal amount of the share, they cannot enforce payment of it a second time. In my judgment it is plain that the 5*d.* was paid in respect of the 5*s.* payable upon the share. The special contract is that the member whose shares have been forfeited shall be liable to pay all calls 'owing upon or in respect of such shares.' The payment which he made was made under a liability to pay the call upon or in respect of the shares at the time of forfeiture. Its payment was, pro tanto, a discharge of the 5*s.* Suppose that a third party has guaranteed to a limited company the payment by a member of his calls upon his shares, and that under that guarantee the company recovers against the guarantor and not against the member, still the payment made by the guarantor will be a satisfaction pro tanto of the liability on the shares just as much as if the payment had been made by the member. I see no ground upon which the company should be entitled to recover the 5*d.* twice over—once from the forfeited member, and again from the member who becomes the purchaser after the forfeiture. The purchaser is liable for the whole amount unpaid, but not for the whole amount irrespective of such payments as the company may recover from the forfeited member."

In my judgment the principle of this decision must really cover the converse case, and to the extent that the new allottee pays up the uncalled capital this payment must enure for the benefit of the original allottee who has forfeited and release him pro tanto in respect of the damages for which his breach of contract in failing to pay the calls rendered him liable. For it would seem absurd to suggest that if the company sues the original allottee before seeking to make the new allottee liable the company can only recover the amount of the unpaid calls while if it sues the new allottee first it can, having recovered the full amount of the unpaid calls from such new allottee, then proceed to recover the

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1930
BOLTON, *In re.*
NORTH BRITISH ARTIFICIAL SILK, LD., *Ex parte.*

same amount from the original allottee and to the extent of the value of the unpaid calls receive the nominal amount of the share twice over. For these reasons I think Mr. Stable's argument must prevail, and the proof of the North British Artificial Silk Ld. must be limited to the 1101*l*. 18*s*. 9*d*.

Solicitors: *Grundy, Kershaw, Samson & Co.*; *Thomas Cooper & Co.*

A. R. T.

In re LOUCH.

LUXMOORE J.
1930
April 1.

Practice—Taxation—Solicitor's Bill of Costs—Solicitor's Remuneration Rules, 1920—Addition of 33⅓ *per cent. to Profit Charges after Taxation—Order* LXV., *r.* 10B.

A solicitor who has omitted the 33⅓ per cent. increase allowed by Order LXV., r. 10B, from his bill of costs can claim to have it allowed after his bill of costs has been taxed.

THIS was a summons to review taxation of costs.

The applicant acted as solicitor for the Salisbury and Fordingbridge Drainage District Board in connection with litigation in which that board was the plaintiff. The litigation was settled, and in due course the board obtained the common order to tax the solicitor's bill. The bill was delivered in two parts. The first part related to the work done in the country by the applicant, and the other part related to work done in London by his London agents. In the first part there was no mention of the usual 33⅓ per cent. addition to the profit charges authorized by the Solicitors' Remuneration Rules, 1920. The taxing master taxed the bill in due course, and on May 10, 1929, the applicant submitted his objections to the taxation. By one objection he sought to add to the first part of his bill the 33⅓ per cent. on the amount of the profit charges. The board opposed any such addition, and the taxing master held that in view of the client's objection nothing could be allowed by way of percentage on the profit charges.

L. W. Byrne for the applicant. The question in this case is what is the effect of Order LXV., r. 10B? That rule refers only to Court matters; this is a Court matter, and technically comes within the rule. The rule says that the 33⅓ per cent. increase "shall be allowed." Therefore the matter is not within the discretion of the taxing master, and he is bound to allow the increase, even after the bill has been taxed. *In re Grant, Bulcraig & Co.* (1) is the only case that refers to a taxing master allowing an item omitted from a solicitor's bill of costs as a question of principle, but that case was decided before the rule in question here came into force.

H. S. G. Buckmaster for the respondent board. On principle this is an attempt to alter a bill of costs after it has been taxed, and that has never been allowed. The applicant after omitting the 33⅓ per cent. in his bill of costs cannot now claim to have it allowed.

LUXMOORE J. Apparently the taxing master has decided this case on the ground that there is no power to amend the bill as delivered. During the course of the hearing I was told that the taxing master's note embodied what was the actual practice of the taxing office in cases to which the Solicitors' Remuneration Rules, 1920, applied, and I stood the matter over in order that I might get a report from the chief taxing master as to the practice. The chief taxing master has now made the report, and it is before me. He says: "I understand that my report is required only on the point whether any practice has been established in the taxing office affecting the question raised by the second objection in this case, that is, whether the Court is precluded from allowing to a solicitor, who has delivered a bill without charging the increase of 33⅓ per cent. sanctioned by the Solicitors' Remuneration Act General Order, 1919, any remedy for the omission." I think that is a mistake in the report for the Solicitors' Remuneration Rules, 1920. "No such practice has been established. and if the question had arisen before me to-day I should have treated it as res integra. So far as I can learn, since

(1) [1906] 1 Ch. 124.

1918, when it first became capable of arising, the question has been contested in the taxing office only two or three times, and in each instance the decision of the taxing master was accepted as final. I should perhaps add that a record is kept of all resolutions passed by the taxing masters at their periodical meetings, as well as of all applications to the Court to review taxations, and I have searched this source of information before making this report."

Now I think that the result of that report is that there is in fact no practice relating to the particular question, and I must consider the matter on general principles. It is, of course, well settled that after a bill of costs has been delivered to the client, and certainly where a common order for taxation has been obtained, no alteration is to be allowed except by leave of the Court, and the reason is fairly obvious. It is because in common order cases the incidence of the costs of taxation depends automatically on the answer to the question whether one-sixth or more has been taxed off the bill. The reason is stated clearly by Cotton L.J. in *In re Thompson.* (1) I am reading from *In re Grant, Bulcraig & Co.* (2), where Farwell J. quoted what Cotton L.J. said in *In re Thompson.* (1) Farwell J. says this (3): "The reason for the rule is stated by Cotton L.J. in *In re Thompson* (1): 'It was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which could not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which they knew could stand taxation.'"

This has no application to the percentage allowed under the Solicitors' Remuneration Rules of 1920. Those rules are embodied in r. 10B of Order LXV. of the Rules of the Supreme Court. The rule provides: "The total in any bill of costs of the fees prescribed by this order (as distinct from payments) shall in respect of business done in any cause or matter in the Supreme Court after the 31st day of August, 1919, be increased by 33⅓ per centum, and such increase shall be allowed upon any

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(1) (1885) 30 Ch. D. 441.
(2) [1906] 1 Ch. 124.
(3) [1906] 1 Ch. 128.

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taxation of costs in respect of any such business as well between party and party as between solicitor and client, and in taxations under or pursuant to the Solicitors Act, 1843." Then there is a provision that the rule is to apply to all references to arbitration, and it goes on: "The increase hereby authorised shall not affect the question whether a bill of costs when taxed is or is not less by one-sixth part than the bill delivered, sent or left." It is material to note the form of the rules in question. The direction as to the adding of the 33⅓ per cent. is peremptory in form, the "Increase shall be allowed upon any taxation of costs." The rule does not say that the increase shall be allowed if claimed in the bill, or anything of that sort. It says that the profit charges in the bill "shall be increased"—not "may be increased"—"and such increase shall be allowed," and the rule goes on to provide in the clearest terms that the increase "shall not affect the question whether a bill of costs when taxed is or is not less by one-sixth part than the bill delivered, sent or left." That is, the addition of 33⅓ per cent. is not to have any bearing on the incidence of the costs of taxation. There can, in such a case, be no magic in putting at the end of the bill a claim to 33⅓ per cent. of the total profit costs as shown in the bill. The sum ultimately allowed must necessarily depend upon the total amount allowed on the taxation for profit costs, and can in fact be ascertained with certainty only after the bill has been taxed, and at no other time.

In my view, the Court, in taxing the bill, is bound to allow the 33⅓ per cent. increase if asked for, even although no claim to it is made in the actual bill of costs, and I hold that the taxing master was wrong in refusing to allow the 33⅓ per cent. on the profit charges as ascertained by his taxation. But even if I am wrong in this view, I undoubtedly have power to allow the original bill to be amended by the presentation of a supplemental bill, and, if and so far as is necessary in the circumstances of this case, I am ready to give, and in fact I do give, such leave.

In the result the application by the solicitor succeeds, and, the matter being a matter of principle, and having been raised by the respondents entirely as a matter of principle, I think the ordinary course must be followed, and the respondents must pay the costs of this application.

LUXMOORE J.
1930
LOUCH, *In re.*

Solicitors: *Woodcock, Ryland & Parker, for the applicant; Batchelor, Foord & North, for the respondent board.*

P. J. B.

In re THOMAS'S WILL TRUSTS.

POWELL *v.* THOMAS.

[1929. T. 1557.]

BENNETT J.
1930
Feb. 27.

Will—Construction—Condition precedent—Fulfilment of condition rendered impossible by operation of law before date of will—Condition void—Gift good—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 35; *Sch. I., Part IV.*

Distinguished. In re ELLIOTT, DECD. [1952] 1 Ch. 217

Where a testator makes a gift subject to a condition precedent, the fulfilment of which is rendered impossible by operation of law before the date of the will, the condition is void and the gift remains.

ORIGINATING SUMMONS.

In 1922 the testator commenced an action in the Chancery Division entitled *Thomas* v. *Thomas* [1922. T. 1268]. The action was based on settlements dated October 20, 1670, and February 22, 1730, under which the testator claimed to be entitled as tenant in tail to one undivided fifth part of the estates thereby settled, including both surface and minerals. The action was never set down for trial, and no step was taken since delivery of the defences of the respective defendants on October 14, 1925. By his will dated January 17, 1928, the testator devised and bequeathed all his residuary estate (hereinafter called "the trust fund") to his trustees upon trust to pay out of the capital or income of the trust fund the costs and expenses of his brother, the defendant, J. L. Thomas, in establishing his claim by action at law to the settled estates, and in the event of his being successful (but not otherwise) in establishing these claims, the trustees were to hold the trust fund in trust for the defendant, J. L. Thomas, absolutely, and in the event of J. L. Thomas not being successful in establishing these claims, then the trustees were to hold the trust fund in trust, on like conditions, for the son of J. L. Thomas, and in the event of his not being successful in establishing these claims, then the trustees were to hold the trust funds in trust, on like conditions, for his eldest son, and in the event of the failure of the above trusts, then the trustees were to hold the trust fund and accumulate the income thereof until the death of the eldest son of the son of J. L. Thomas, and after his death they were to distribute according to English law the trust fund and the accumulation of income amongst such persons as would be entitled if the trust fund had been vested in the eldest son of the son of J. L. Thomas, and he had died intestate.

The testator died on January 23, 1928.

At the time the testator made his will his interests (if any) in the settled estates had, by virtue of s. 35 and Part IV. of Sch. I. of the Law of Property Act, 1925, been converted into absolute interests in personal property. Under these circumstances the plaintiff as sole trustee of the testator's will took out this summons asking to have it determined whether upon the true construction of the will, and in the events that had happened, the defendant, J. L. Thomas, was now absolutely entitled to the residuary estate of the testator.

G. D. Johnston for the plaintiff.

Gover K.C. and *C. R. R. Romer* for the defendant, J. L. Thomas. If the testator were entitled as tenant in tail to one undivided fifth share of the settled estates, his interest, by virtue of s. 35 and Part IV. of Sch. I. of the Law of Property Act, 1925, was converted on January 1, 1926, into personal property: *In re Price* (1), and would pass to his executors. The condition having become impossible of fulfilment, it is void, and the gift takes effect: Theobald on Wills, 8th ed., p. 639.

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(1) [1928] Ch. 579.

Harold Christie for next of kin of testator. The settled estates were part of the testator's interest in freehold property, and the condition precedent cannot be set aside: *In re Turton.* (1) A condition precedent cannot be set aside because it is not for the benefit of the devisee or legatee: *Robinson* v. *Wheelwright.* (2)

J. V. Nesbitt and *Bonner* for other parties.

BENNETT J. [His Lordship stated the facts, and continued:] The estates to which the testator was desirous that his brother Jenkins Lewis Thomas should establish his title were estates to one-fifth of which the testator was making a claim as tenant in tail in possession in the above mentioned action. Now, before he made his will the Law of Property Act, 1925, had come into operation, and as a result of it, upon the assumption that the testator was entitled as tenant in tail in possession, his interests, by virtue of s. 35 and Part IV. of Sch. I. of the Act, were converted into absolute interests in personal property. That result follows from the decision of Clauson J. in *In re Price.* (3)

The result of that was that by operation of law the condition precedent to the gift had become impossible when the testator made his will, and it is contended by Mr. Gover on behalf of the testator's brother that the condition having been made impossible of performance by the operation of law, the legatee takes the gift notwithstanding the condition. The question therefore is whether the gift takes effect, or whether the testator has died intestate, his estate being personal estate. The matter seems to me to be settled in favour of the brother by a decision of Sir R. Henley in *Lowther* v. *Cavendish.* (4) Dealing with the old Roman law the Lord Keeper says: "If any legacy was given from an heir to a legatee upon condition, or in order to compel the heir to do, or to restrain him from doing, any particular thing, such legacy was deemed to be given *nomine pœnæ*, and void. This was very irrational, for *cujus est dare, ejus est disponere.*

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(1) [1926] Ch. 96.

(2) (1855) 21 Beav. 214.

(3) [1928] Ch. 579.

(4) (1758) 1 Eden, 99, 116.

Justinian therefore corrects the law, and says such legacies shall stand on the ground of other legacies, unless the condition be impossible, prohibited at law, or infamous. However, the best comment on this passage and species of legacies, is Mr. Swinburn, 4 pt., sec. 6, fo. 229. When the condition is extreme, that is to say, either necessary or impossible, such condition hindereth not the legatary, but that he may recover the legacy; but (fo. 223), that impossibility is with this limitation. When the condition is not impossible at first, but becomes impossible afterwards, for then it is not void, but makes the disposition void." If that correctly states the law, the condition precedent to this gift was impossible by law at the time the testator made his will, and therefore the legatee takes the gift notwithstanding the condition.

Solicitors: *Jenkinson, Meyler & Campbell; Stafford Clark & Co.*

P. J. B.

In re ROBERTSON.

COLIN *v.* CHAMBERLIN.

[1929. R. 989.]

BENNETT J.

1930

Feb. 28 :
March 5.

Charity—Charitable bequest—Residue for restoration or maintenance of Church—Fund more than sufficient—General charitable intention—Surplus—Cy-près.

A testatrix bequeathed her residue "to be used towards the restoration or maintenance of" a certain church :—

Held, that she intended that the residue should be used either for the restoration or maintenance of the church, or for both purposes, and that, there being a general charitable intention, any surplus must be applied cy-près.

In re King [1923] 1 Ch. 243 followed.

In re Stanford [1924] 1 Ch. 73 distinguished.

ADJOURNED SUMMONS.

By her will dated October 30, 1928, Emma Robertson, of Rugby, after bequeathing certain legacies gave the following direction with regard to the residue of her estate: "The whole of which residue I should wish to be used towards the restoration or maintenance of St. Peter's Church, Shaldon, Teignmouth, S. Devon."

The testatrix died on January 25, 1929, and this summons was taken out by the executors for the determination of the question whether the testatrix had effectually disposed of her residuary estate or whether it was undisposed of and passed to her next of kin, and that, in the event of the residuary estate having been effectually disposed of, all necessary and proper directions as to the manner in which effect should be given to such disposition might be given.

[His Lordship determined that the testatrix did not die intestate with respect to her residuary estate, but made an effectual disposition for charitable purposes. It then remained for the Court to decide how effect might be given to that disposition.]

Roger Turnbull for the plaintiffs.

Morton K.C. and *Rawlence* for one of the next of kin. The sum available for the purpose is approximately 19,000*l.* The gift is alternative and an election must be made whether the church is to be restored or maintained. Even if it were held that the gift is for the restoration and maintenance of the church there would be a surplus after provision has been made for both purposes. Any surplus goes to the next of kin.

[They referred to *In re Stanford* (1) and to Jarman on Wills, 7th ed., p. 452.]

Stafford Crossman for the Attorney-General. The Court having found a general charitable purpose with regard to this bequest, any balance is applicable cy-près. This is the same case as *In re King.* (2) *In re Stanford* (1) is distinguishable. That decision does not hold good in the case of a gift of residue. If the property has once been irrevocably given to charity, there is no right in the testator to get it back: see Tudor on Charities, 5th ed., pp. 158, 159. [He also referred to *In re Monk.* (3)] In *In re Stanford* (1) Eve J. failed to find a general charitable intention and could not, therefore, give a direction for the surplus to be applied cy-près. In that case the testator intended to give only so much money as would be sufficient to carry out his wishes. That is the true construction and the only construction which would justify the decision. A general intention in favour of charity is an intention that the whole of the fund shall go to charity. If the Court could find anything conditional, the intention would then not be a general charitable intention. The intention must be one which prevents a resulting trust.

Morton K.C. in reply.

BENNETT J. In this case I have already determined that the testatrix did not die intestate with respect to her residuary estate, but made an effectual disposition for charitable purposes. [His Lordship then read the clause relating to the restoration or maintenance of the church and continued:] The residue of the estate, after payment of the debts, funeral and testamentary expenses and legacies, amounted to 19,000*l.*

(1) [1924] 1 Ch. 73.

(2) [1923] 1 Ch. 243.

(3) [1927] 2 Ch. 197.

approximately, and evidence has been filed on behalf of the next of kin which shows that, upon the estimate of a very capable architect, the sum required for the restoration of the church in question, giving a liberal interpretation to the word "restore," will amount to 9187*l.*, and that the cost of maintaining the church is estimated to be 200*l.* per annum. It follows that, if the estimate is accurate, the whole of the residue will not be required to carry out the wishes of the testatrix. Upon that footing counsel for the next of kin has argued, first, that the gift of residue is an alternative gift of either so much money as is needed to restore the church or so much as is needed for its maintenance, and that an election must be made whether the church shall be restored or maintained; and that, the election having been made, and sufficient residue having been retained, the balance is given to the next of kin as on an intestacy. Secondly, it is argued that, assuming as a matter of construction that the gift is not alternative but is a gift for restoration and maintenance, even then the residue will not be exhausted, and that, after the sum required has been ascertained and set aside, the balance goes to the next of kin as on an intestacy. Both arguments fail.

As a matter of construction I do not think that the testatrix ever had in her mind the idea of an election being made as to the purpose for which the residue should be applied—namely, whether it should be applied to restoration or maintenance. I think that she meant her residue to be used either for restoration or maintenance, or both. That disposes of the first of Mr. Morton's arguments.

Upon the footing that the estimate of the amount which will be required to restore and maintain the church is accurate, there will still be a surplus of residue, and the argument that the next of kin are entitled to any balance is based on the decision of Eve J. in *In re Stanford.* (1) That was a case in which a testator had given a special legacy of consols to be applied to the express purpose of carrying on to completion and publication his Etymological Dictionary of

(1) [1924] 1 Ch. 73.

BENNETT J.
1930
ROBERTSON, *In re.*
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Anglicised Foreign Words and Phrases, and he had disposed of his residue in favour of a residuary legatee; and it was upon such a will that Eve J. decided that, as the legacy proved more than sufficient, the balance went to the residuary legatee. It appears to me to be possible and, indeed, I think, likely, that the ground of the decision was that the testator, from the language used by him, had shown an intention to give the sum of consols, or so much of it as was necessary, for the publication of the dictionary, in which case there could be no general charitable intention.

On behalf of the Attorney-General the decision of Romer J. in *In re King* (1) is relied on—a decision which is directly in point. In that case the testatrix had made a bequest of her residue for the provision of a stained glass window. This was held to be a good charitable bequest. The residue was more than sufficient to meet the cost of a window of the best possible character. Romer J. held that the surplus did not go to the next of kin, but that it must be applied cy-près. That decision appears to me to be an authority which governs the present case, and following it I decide against the next of kin and in favour of the Attorney-General.

Solicitors: *Peake, Bird, Collins & Co.; Treasury Solicitor.*

J. L. D.

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(1) [1923] 1 Ch. 243.

In re SCHOALES.

SCHOALES *v.* SCHOALES.

BENNETT J.
1930
April 3, 4.

[1929. S. 4022.]

Charity—Will—Gift "to the Roman Catholic Church, for the use thereof"—Validity.

A testatrix made a residuary bequest "to the Roman Catholic Church, for the use thereof":—

Held, that the gift was a valid charitable bequest.

Dicta of FitzGibbon and Holmes L.JJ. in *MacLaughlin* v. *Campbell* [1906] 1 I. R. 588 adopted.

In re Barnes (The Times, July 21, 1922) followed.

ADJOURNED SUMMONS.

A testatrix, by her will dated January 18, 1929, gave life interests in her property to her three sisters and made certain pecuniary bequests, and, subject thereto, bequeathed "my entire property, to the Roman Catholic Church, for the use thereof."

The testatrix died on January 20, 1929.

This summons was taken out by the legal personal representatives of the testatrix for the determination of the question (inter alia) whether any and if so what persons or body of persons were entitled under the gift in the will of the entire property of the testatrix to the Roman Catholic Church for the use thereof, or whether there was an intestacy in respect thereof.

F. H. L. Errington for the plaintiffs.

Horace Freeman for the next of kin. The gift is void: see *MacLaughlin* v. *Campbell.* (1) If the gift is for the purposes of the denomination it could be administered by this quasi-corporate institution for purposes which would not necessarily be charitable. There is nothing in the present bequest restricting the gift to such things as are charitable and religious. It might be used to maintain a community

(1) [1906] 1 I. R. 588.

such as was held in *Cocks* v. *Manners* (1) not to be charitable. *In re Barnes* (2) is not applicable, because the purposes of the Church of England must be regarded as being charitable, the only recognized purpose of the Church of England being the furtherance of religion, whereas the furtherance of religion is not the only purpose of the Roman Catholic Church. The Church of England is a religious body or nothing. The Church of Rome is more than a religious body. It has civil functions as well as religious functions : see *In re Moore.* (3)

[He also referred to *Dunne* v. *Byrne.* (4)]

C. R. R. Romer for the Archbishop of the Roman Catholic Archdiocese of Liverpool. On the facts, as known, the testatrix intended the gift for the particular church which she was in the habit of attending, rather than for the general religious purposes of the Roman Catholic Church. The gift is a valid charitable bequest. The argument on behalf of the next of kin amounts to a contention that the gift should be read not as a gift to the Roman Catholic Church, "for the use thereof," but as a gift "for Roman Catholic purposes." Such a gift would be altogether different, as temporal power is a purpose of the Roman Catholic Church.

Stafford Crossman for the Attorney-General. This gift on its true construction is a gift to an operative institution which gives spiritual edification to its members. It is a charitable gift. The dicta of FitzGibbon and Holmes L.JJ. in *MacLaughlin* v. *Campbell* (5) govern this case. The transcript of the judgment in *In re Barnes* (2), as set out in Opinions of the Legal Board, 2nd ed., p. 141—a publication issued by the National Assembly of the Church of England—shows that Romer J. based his decision on the dictum of FitzGibbon L.J. above referred to. There is no distinction, from the point of view of validity as a gift for charitable purposes, between a gift to the Church of England and a gift to the Church of Rome.

(1) (1871) L. R. 12 Eq. 574.

(2) Times Newspaper, July 21, 1922, post, p. 80*n*.

(3) [1919] 1 I. R. 316.

(4) [1912] A. C. 407.

(5) [1906] 1 I. R. 588, 597, 598.

BENNETT J. In this case the residuary estate of the testatrix after the death of her sisters is given to the Roman Catholic Church for the use thereof. The first question to be decided is who takes the gift after the death of the sisters, and there are three suggestions, the first being that the gift was intended to be taken by the particular church which the testatrix had attended for some years. The second suggestion is that the gift is intended for the quasi-corporate institution consisting of those persons who carry on the Roman Catholic religion. If the Court, adopting a third possible meaning of the expression "Roman Catholic Church," were to take the view that the gift was intended for the individual members of the Roman Catholic Church, the gift would in that case fail for uncertainty.

In my judgment, when the testatrix gave her property on the death of her sisters to the Roman Catholic Church, she had in mind the quasi-corporate institution consisting of those individuals who carry on the Roman Catholic religion, and the only question is whether a gift to that body for the use thereof is a good charitable gift. It is a good charitable gift if it can be used only for purposes which the law regards as charitable purposes, otherwise it is void on the principles stated in *Morice* v. *Bishop of Durham.* (1)

Mr. Freeman, on behalf of the next of kin, has argued that the gift is void, because it is not necessary to confine its use to charitable purposes. He bases his argument on three decisions. The first of these is *MacLaughlin* v. *Campbell* (2), a case in which the question was whether a trust for such Roman Catholic purposes in the parish of Coleraine or elsewhere as the trustees might think fit and proper was valid, and that trust was held void, one of the grounds for that decision being that there were a number of Roman Catholic purposes which were not necessarily charitable. The second case was *Dunne* v. *Byrne.* (3) In that case a residuary bequest to the Roman Catholic Archbishop of Brisbane to be used

(1) (1805) 10 Ves. 521.

(2) [1906] 1 I. R. 588.

(3) [1912] A. C. 407, 411.

and expended wholly or in part as the Archbishop might judge most conducive to the good of religion in the diocese was held not to be a good charitable bequest and to be void, and Lord Macnaghten, who delivered the judgment of the Privy Council, said: "This is not in terms a gift for religious purposes, nor are the words synonymous with that expression. Their Lordships agree with the opinion of the Chief Justice that the expression used by this testator is wider and more indefinite."

The other case on which Mr. Freeman relied was *In re Moore* (1), where a bequest of 10,000*l.* to "His Holiness . . . . the Pope . . . . to use and apply at his sole and absolute discretion in the carrying out of the sacred office" was held void, as being applicable to purposes not strictly charitable.

If on the true construction of the present question the gift is one which can be applied for purposes not strictly charitable the gift must fail. The question is whether it can be so applied.

In the first case referred to by Mr. Freeman, FitzGibbon and Holmes L.JJ. expressed their views upon the effect of a gift to the Roman Catholic Church. FitzGibbon L.J. says (2): "In his argument, Serjeant Dodd brought in the word 'Church,' which is not in the will. If that word had been used, it would have been necessary to consider the sense in which the testator used it. It has two distinct meanings: it may mean the aggregate of the individual members of the 'Church'; or it may mean the quasi-corporate institution which carries on the religious work of the denomination whose name it bears. If the gift were made to 'the Church,' e.g. the 'Church of Rome' or the 'Church of Ireland,' I should think that it would import —at least prima facie—the operative institution which ministered religion and gave spiritual edification to its members; a gift in such terms would exclude objects which would be included in a gift for the 'purposes' of the individual members of a religious body." Holmes L.J. on p. 598 says:

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(1) [1919] 1 I. R. 316.

(2) [1906] 1 I. R. 588, 597.

"If, on the true construction of the will, I were to hold that Roman Catholic purposes are to be understood as the purposes of the Roman Catholic Church, I should not hesitate to decide that the legacy was to be used for teaching the doctrines of that Church, and supporting its worship and services, in which case it would be clearly charitable."

Those dicta, in my judgment, clearly cover this case. Of course, they are but dicta. Romer J., however, had to consider them in the case of *In re Barnes* (1), as will be seen from the transcript of his judgment as set out at p. 141 of the second edition of a publication issued by the National Assembly of the Church of England entitled Opinions of the Legal Board. In the course of his judgment Romer J. says: "In this case the testator gave all his estate and property to the Church of England absolutely, and the first question that has to be determined is 'What does the testator mean in that will by the Church of England?'" Then he goes on to say, referring to *MacLaughlin* v. *Campbell* (2): "In the case to which I have referred FitzGibbon L.J., in a case in which he had to consider the effect of a gift 'for such Roman Catholic purposes' as the trustees might deem fit and proper, where the counsel arguing in support of the validity of the gift had said that that was equivalent to a gift to the Roman Catholic Church, says that: 'If the gift were made to "the Church," e.g. the "Church of Rome," or the "Church of Ireland," I should think that it would import'—at least, prima facie—'the operative institution which ministered religion and gave spiritual edification to its members.' Now in my opinion that is the meaning in which the testator has used the words 'Church of England,' and I hold that this is a gift to the institution which ministers religion and gives spiritual edification to the members of the Church of England. If that be so, for what purposes is it given to the Church of England? It appears to me that it is obviously given for these very purposes which I have just mentioned, namely, for the purposes of religion

(1) Times Newspaper, July 21, 1922, post, p. 80*n*.
(2) [1906] 1 I. R. 588.

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and for giving religious edification and so forth. That being so, I think without any question that the gift is a good charitable gift."

It seems to me that I ought to follow the decision of Romer J. in *In re Barnes* (1) and to hold that the gift of residue is a gift to the institution which "ministers religion and gives spiritual edification" to members of the Roman Catholic Church, for those purposes.

I therefore hold that the gift is a good charitable gift. There will be liberty to apply for a scheme at the proper time.

Solicitors: *Collyer-Bristow & Co.; Ridsdale & Son, for Watts & Carr, Liverpool; Treasury Solicitor.*

J. L. D.

NOTE.

Romer J., 1922. July 20.

In re BARNES.

SIMPSON *v.* BARNES.

[1922. B. 3516.]

SUMMONS from the Manchester District Registry.

The facts are sufficiently stated in the following judgment of Romer J.

Eastwood for the plaintiff, the executor of the will.

Tomlin K.C. and *F. H. L. Errington* for the Central Board of Finance of the Church of England.

Beebee for the next of kin and heir at law of the testator.

Dighton Pollock for the Attorney-General.

ROMER J. In this case the testator gave all his estate and property to the Church of England absolutely, and the first question that has to be determined is "What does the testator mean in that will by 'the Church of England'?" The first question in the summons is this: "Who are the persons or what is the institution or body meant and intended by the words 'Church of England' in the gift contained in the said will of all the testator's estate and property to the Church of England ?" Now Mr. Beebee, who appears for the next of kin, has contended that this is a gift to all the persons who at the time of the death of the testator can say: "I am a member of the Church of England." He says that, being a gift to a body of persons whom it is impossible to identify, the gift fails and the testator has died intestate. Now it is quite obvious that the words "Church of England" are capable of more than one meaning. Adopting the statement in Halsbury's Laws of England, vol. 11., p. 371, it says this, after defining on p. 370 the Church of England as "That Branch of the Holy Catholic and Apostolic Church which was founded in England when the English were gradually converted to Christianity between the years 597 and 686": "the Church of England, as thus defined, may be considered as an aggregate of individuals, and in that sense may be regarded as including all persons who adhere and conform to the liturgy and ordinances of the Church of England as by law established, or it may be considered as an organised operative institution." On p. 356 of the same volume, in a note, it is stated: "'Church' has two distinct meanings,—It may mean either the aggregate of the individual members of the Church, or it may mean the quasi corporate institution which carries on the religious work of the denomination whose name it bears." Then there is a statement for which *MacLaughlin* v. *Campbell* (1) is given as authority which says: "if used in conjunction with the name of the denomination (e.g. the Church of Rome or the Church of Ireland) it prima facie imports the operative institution which ministers religion and gives spiritual edification to its members." It appears to me that the two statements which I have read are good sense and good law, and the question that I have to determine is, first, in which of those two senses has the testator used the words the "Church of England." It appears to be quite impossible to suppose that the testator here intended to benefit each and every member of the Church of England in the wide sense contended for by Mr. Beebee. It appears to be quite obvious that he refers to the operative institution which has, in one passage which I have read, been referred to as a quasi corporation, the operative institution which ministers to religion and gives spiritual edification to its members. In the case to which I have referred FitzGibbon L.J., in a case in which he had to consider the effect of a gift "for such Roman Catholic purposes" as the trustees might deem fit and proper, where the counsel arguing in support of the validity of the gift had said that that was equivalent to a gift to the Roman Catholic Church, says this: "If the gift were made to 'the Church,' e.g. the 'Church of Rome,' or the 'Church of Ireland,' I should think that it would import"—at least, prima facie—"the operative institution which ministered religion and gave spiritual edification to its members." Now in my opinion that is the meaning in which the testator has used the words "Church of England," and I hold that this is a gift to the institution which ministers religion and gives spiritual edification to the members of the Church of England. If that be so, for what purposes is it given to the Church of England ? It appears to me that it is obviously given for these very purposes which I have just mentioned,—namely, for the purposes of religion and for giving spiritual edification, and

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(1) Times Newspaper, July 21, 1922, see note on this page.

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(1) [1906] 1 I. R. 588, 597.

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so forth. That being so, I think without any question that the gift is a good charitable gift.

The only other point which was partially argued before me was as to who in the circumstances could give a receipt for the residuary estate which I have held was validly given to the Church of England. Mr. Tomlin, who appears for the Central Board of Finance of the Church of England, claims that in the circumstances he has a right to have it paid to his clients. Mr. Pollock, on behalf of the Attorney-General, disputes that as a claim of right, but he would be quite willing if a scheme were settled to provide by that scheme for payment of this money to the Central Board of Finance. In the circumstances I am glad to say I have not to decide that very interesting and perhaps more difficult point, because Mr. Tomlin agrees that, without prejudice in any way to his right to argue that at full length on some other occasion, he is willing on this occasion, and perhaps on this occasion only, that the money should be paid to his clients in pursuance of an agreement which I now sanction for that purpose.

The costs of all parties as between solicitor and client will come out of the estate.

Solicitors: *Simpson & Simpson, Manchester; Markby, Stewart & Wadesons; Treasury Solicitor.*

J. L. D.

CLAUSON J.

1929

July 4.

In re BOWER.

BOWER *v.* MERCER.

[1929. B. 2217.]

In re BOWER.

BOWER *v.* MERCER.

[1929. B. 2218.]

Will—Power of Appointment—Special Power—Power Non-existent at Date of Will—Confirmation by Codicil—Exercise by Anticipation of Special Power.

In 1916, E. M. by her will in expressed exercise of the power contained in a settlement of 1906 and of the power which might be given to her by the will of her father, who was still living, and also in exercise of all and every other power then or at the time of her decease her thereunto enabling, appointed the income arising from her share in the 1906 settlement fund and the income arising from any share which she might become possessed of under the will of her father or otherwise howsoever should be paid to her husband H. M. during his life.

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In 1918, E. M. became entitled under the trusts of a settlement of that date to appoint by deed or will, after her death, an interest in favour of her husband until his remarriage in the share thereby settled upon her and her children in the settlement trust fund.

In 1919, E. M. executed a codicil by which after making certain alterations in some bequests contained in her will, she in all other respects confirmed her will.

In 1924, E. M. became entitled under the trusts of a settlement of that date to appoint by deed or will, after her death, an interest in favour of her husband until his remarriage in the share thereby settled upon her and her children in the settlement trust funds.

E. M. died in 1929 without having, since her execution of the codicil in 1919, executed any deed of appointment in favour of her husband or any further codicil.

In consequence of her death without issue, her shares in the settled funds were, subject to any interest therein validly appointed to her husband, settled by way of accruer upon trusts in favour of her brothers and sisters and others :—

Held, first, that by the joint effect of the will and codicil a life interest in E. M.'s settled share in the 1918 settlement fund was validly appointed in favour of H. M. until his remarriage. Secondly, that, as the authority given to E. M. by the 1924 settlement related to an appointment to be made after that date, and there was no confirmation of her will subsequent to the execution of that settlement, there was no valid appointment of any interest in her share in the 1924 settlement funds.

ADJOURNED SUMMONSES.

Elizabeth Mercer by her will dated August 2, 1916, which contained recitals that under a settlement of August 27, 1906, she had power to appoint a life interest in favour of her husband in her share of the trust funds subject to that settlement and that she might have power to appoint a life interest in his favour in the share which might be settled upon her by the will of her father, Thomas Bower, in exercise of those powers and of all and every other power then or at the time of her decease her thereunto enabling appointed that the income arising from her share in the settlement trust funds and from any share which she might become possessed of under her father's will or otherwise howsoever should be paid to her husband, Herbert Mercer, during his life.

By a deed of settlement made on February 4, 1918, Thomas Bower settled a fund consisting of 5 per cent. War Loan exceeding 300,000*l*. upon trusts in favour of his six

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children, of whom Elizabeth Mercer was one, and four grandchildren therein respectively named according to the shares therein specified, the trusts declared in favour of his daughter Elizabeth Mercer being, to pay the income to her during her life and after her death, if she should by deed or will appoint, to pay the income to her husband during his life or until he should remarry, and subject to any such appointment upon trust for her children.

On September 26, 1919, Elizabeth Mercer executed a codicil to her will whereby, after making certain alterations in some specific bequests made by her will, she in all other respects confirmed her will.

By another deed of settlement made on July 2, 1924, Thomas Bower settled a further fund upon trusts in favour of five of his children therein named, including his daughter Elizabeth Mercer and their children, in equal one-fifth shares, such trusts being similar to those declared by the previous settlement of 1918, under which Elizabeth Mercer had power to appoint by deed or will the income of her settled share in favour of her husband during his life or until his remarriage.

Both the settlements of 1918 and 1924, contained provisions that, in the event of any of the children of the settlor on whom a share in the respective trust funds was settled not having a child who should attain a vested interest in his or her settled share, then, subject to the trusts and powers declared and contained in favour of such child of the settlor and his or her children and appointee, his or her share should accrue to and be held in trust; in the case of the 1918 settlement, in favour of the other five of the settlor's children and two grandchildren named in that settlement and in the case of the 1924 settlement, in favour of the other four children of the settlor therein named and another son and two grandchildren also therein named.

The testatrix having died on February 11, 1929, without having had any issue, summonses were accordingly taken out by the trustees of the two settlements, who were the same persons, for the determination, in the one case, of the question whether the will and codicil of the testatrix contained an effective exercise of the power of appointment in favour of her husband, the defendant Herbert Mercer, given to her by the 1918 settlement and, in the other case, of a similar question with regard to the exercise of the power given to her by the 1924 settlement.

Charles Harman for the defendant Herbert Mercer. When the codicil was executed the power given by the 1918 settlement was capable of being exercised, and the effect of the codicil was to incorporate the appointment made by the will into the codicil, with the result that the power to appoint to Colonel Mercer, her husband, given to the testatrix by that settlement was well exercised by her. The codicil had the same effect as if the appointment contained in the will were repeated in it: *In re Blackburn* (1); Sugden on Powers, 8th ed., p. 310, pl. 53. There is no question that a general power can be exercised by anticipation: Farwell on Powers, 3rd ed., pp. 251, 254; *Airey* v. *Bower.* (2) Whether, as a point of law, a special power can be so exercised does not seem to have been actually decided: the point was left undecided in *In re Hayes* (3): the real point there was as to the sufficiency of the language used to show an intention to execute the power. Here, a clear intention is expressed to exercise every power the testatrix might possess at the time of her death. The only question here is whether she could legally do so. A special power should be capable of being validly exercised by anticipation, provided it is not a power in the nature of a trust involving the exercise of discretion. Here, in the case of a power to appoint in favour of a husband no exercise of discretion is involved, the only sort of discretion being as to the extent of the interest to be appointed. The observations of Romilly M.R. in *Walker* v. *Armstrong* (4) upon the question whether it were possible to execute by anticipation a special power which has not come into existence until after its purported execution is mere obiter dictum. In *Cowper* v. *Mantell* (5) the real decision

(1) (1889) 43 Ch. D. 75, 78.
(2) (1887) 12 App. Cas. 263.
(3) [1901] 2 Ch. 529, 532.
(4) (1856) 21 Beav. 284, 305.
(5) (1856) 22 Beav. 223.

there was that the republication of a will by codicil will not have the effect of setting up again a legacy of leaseholds which at the date of the codicil had been adeemed by the testator. In *In re Ackerley* (1) Sargant J., in restating the rule as to the exercise of a special power, said that what was required was a sufficient expression or indication of an intention to exercise it in the will in which it was alleged to have been exercised.

[CLAUSON J. The power given by the 1924 settlement is a power which the donor contemplated being exercised after the settlement: the words are "if she 'shall' by deed or will appoint."]

Such words of futurity are not sufficient by themselves to have that limiting effect; the words may be read as "shall at the time of her decease have appointed."

Even if, for this purpose, the will is to be regarded as having been executed on the day of its actual execution, and the date of the testatrix's death is to be treated as immaterial to the question, still there may be a valid execution of the power when the testatrix has said in effect: "If hereafter I become entitled to exercise a power in my husband's favour, then I will exercise it."

[CLAUSON J. But it is outside the mandate given. The settlor by the 1924 settlement authorized the testatrix to do something in the future which would have the effect of interposing a life interest for her husband. The settlor might have used a form of words which possibly might have the result of ratifying something the testatrix had already done.]

Where a power is authorized to be exercised upon a contingent event, it may be exercised before the happening of the contingency: Sugden on Powers, 8th ed., p. 262, pl. 5. *Holmes* v. *Coghill* (2) does not affect the present case: there, the power exercised by the will was discharged before the death of the appointor, so that at the time the codicil was executed, there was nothing left in the will upon which the codicil could operate. Whether the power given by the 1924 settlement has been exercised cannot be ascertained

(1) [1913] 1 Ch. 510.

(2) (1802) 7 Ves. 499.

except by the death of the donee of the power; her will by which she purported to exercise the power has no force until her death, which is the event future in point of time to the creation of the authority given by the 1924 settlement.

[CLAUSON J. The alleged exercise of the power by the will was an act past in relation to the creation of the authority to exercise it given by the 1924 settlement. A will is only to be treated as having been executed at the moment of death, so far as the Wills Act has enacted that it shall be so treated by ss. 24, 27, which do not assist the present case.]

Baden Fuller for the defendant Robert Bower, who claimed to be beneficially interested in the testatrix's shares under both settlements by virtue of the accruer trusts, and for other defendants claiming to be similarly interested under the 1918 settlement, was not called upon to argue the point raised on the 1924 settlement.

As to the power given by the 1918 settlement, it is common ground that the Wills Act does not assist the defendant Colonel Mercer. It is essential in the case of a special power to show a clear intention to exercise it. I admit it is possible that such an intention may be shown by some means other than a reference to the power or to the property. But no case has been cited in which it has been decided that a mere reference to a future power, a power which is not in existence at the date of the purported appointment, is sufficient. In such a case the terms of the power are necessarily unknown to the appointor. The codicil confirming the will has the effect only of confirming it so far as it had any operation: it could not have the effect of putting something into the will which was not already there. If the words used in the will referring to future powers are read into the codicil, the powers are still future to the date of the codicil. As Byrne J. pointed out in *In re Hayes* (1) there is no presumption in favour of an exercise of the power by reason of the general words of appointment, but the matter has to be dealt with as if the Wills Act had not been passed.

(1) [1900] 2 Ch. 332, 336.

L. W. Byrne for other defendants claiming to be similarly interested under the 1918 settlement. An intention to exercise a special power cannot be shown in a will without showing the pre-existence of an authority to exercise it. The power in *In re Blackburn* (1) was in existence at the time the testator purported to exercise it, which is not the case here. The reference to the power which she purported to exercise is far too general and vague in its terms to effect an exercise of a power the very existence of which she was not aware of: *In re Slack.* (2)

Clauson J. I am indebted to counsel on all sides for a most interesting argument. I find myself in the somewhat unusual position of having to decide a point which every one agrees is not covered by authority. I have been referred to a number of cases which I do not propose to travel through, because, although they may point in one direction or another, I do not think it is disputed that none of them is a direct authority on the matter with which I have to deal. To avoid having to refer to the matter again, and to prevent any misconception, may I say that it is agreed on all hands that the provisions of ss. 24, 27 of the Wills Act have no bearing upon the point which I have to decide.

On August 2, 1916, Mrs. Mercer made a will, the material part of which is in these terms: "Whereas by a settlement of 1906 . . . . I have power to appoint by deed or will that after my decease the whole or any part of the income of my share of the trust funds mentioned in the said indenture shall be paid to my husband during his life or any less period"—I pause to say I have nothing at all to do with the fund referred to in the settlement of 1906—"and whereas under the will of my father the said Thomas Bower the elder"—I mention parenthetically that he was then living and is still living—"I may have power to appoint by my will that after my decease the whole or any part of the income arising from the share which may be settled upon me by my said father Thomas Bower by his said will shall be paid to my husband during his life or any less period, now in exercise of the said power contained in the said indenture of the 27th day of August, 1906, or which may be given to me by the will of my said father Thomas Bower as aforesaid and also in exercise of all and every other power now or at the time of my decease me hereunto enabling I appoint that the whole of the income arising from my share in the said trust funds mentioned in the said indenture of the 27th day of August, 1906, and also the whole of the income arising from any share which I may become possessed of under the will of my said father Thomas Bower"—then come the important words—"or otherwise howsoever shall be paid to my husband the said Herbert Mercer during his life."

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(1) 43 Ch. D. 75, 78.

(2) [1923] 2 Ch. 359, 362, 364.

Let me construe that will as at the date on which it was executed—namely, August 2, 1916, and see what the lady said. I understand her to say this: "Whereas I now have a power under the settlement of 1906, and whereas I think I am going to have a power in the future, which I hope will be given to me by my father's will in exercise of those powers and also in exercise of all and every other power now—that is to say, on August 2, 1916—or at the time of my decease enabling me to do what I am about to attempt to do, namely, give my husband a limited interest in the income, I appoint that the whole of the income arising from my share under the 1906 settlement and also the whole of the income arising from any share in other property of which I may become possessed under my father's will after to-day, August 2, and also the whole of the income arising from any of the shares in other property of which I may become possessed after to-day, that is August 2, 1916, by any other means whatsoever shall be paid to my husband Herbert Mercer during his life."

On February 4, 1918, the father executed a settlement by which he provided this—I am not reading the words quite literally, because the trust in favour of this lady is given by reference and I am substituting her name in the clause which declares the trusts, with reference to which her share of the settlement funds is settled: the trustees are to stand possessed of certain property and to pay the annual income to Elizabeth Mercer during her life, with certain protective provisions about which I need not trouble; and from and after her death, if she shall by deed or will appoint, pay the whole or any part of the annual income thereof to or for the benefit of the husband of Elizabeth Mercer during his life or for any less period, and, subject to any such appointment, upon trust for the children of Elizabeth Mercer. It appears to me that the fund which was comprised in the settlement of 1918 and in which Elizabeth Mercer was given a life interest is aptly described by the words "share which I may become possessed of otherwise than under the will of my father Thomas Bower."

The next matter is this. On September 26, 1919, Elizabeth Mercer executed a codicil by which, after dealing with some specific bequests, she said this: "And in all other respects I confirm my said will." I understand the effect of those words to be that by her codicil she says: "I confirm my will and I repeat that in exercise of every power which at the date of my will on August 2, 1916, or at the time of my decease may enable me to confer a benefit on my husband I appoint the whole of the income arising from any share which subsequently to the date of my will, namely, August 2, 1916, I may become possessed of by any means whatsoever shall be paid to my husband, Herbert Mercer, during his life." It appears to me that the effect of the execution of that codicil by Mrs. Mercer was to appoint to her husband, subject of course to her own life interest, the right to receive during his life or, rather, during widowerhood—for it was agreed that he was entitled under the referential trusts to no greater interest than an interest during widowerhood—the income of the fund of which she became possessed by virtue of the settlement of 1918, the fund being one the income of which she became possessed of otherwise than under the will of her father within the language of the appointment. In my view there is quite sufficient in the will as republished in the codicil to point clearly to her intention to utilize any power at that time—that is, at the date of the codicil or at the time of her decease—enabling her to appoint a life interest or similar interest in favour of her husband. She was then possessed of such a power; she became possessed of it before the date of her codicil, so that the codicil had this effect upon the will, that it brought the 1918 settlement fund, the income of which Mrs. Mercer was given a power to appoint in favour of her husband, within the operation of the appointment by her will, an operation which that appointment would not have had, but for the codicil. Accordingly, I hold that by the joint effect of the will and codicil upon the 1918 settlement, Colonel Mercer became entitled to a life interest in that settlement fund determinable on his remarriage.

After that settlement was executed, something further occurred. Before the lady died, her father executed another settlement, that was the settlement of 1924, between the date of the codicil and the date of the death. By that settlement he settled a certain fund in such a way that a part was to be held on trust to pay the annual income to Mrs. Mercer during her life and from and after her death, if she should by deed or will so appoint to pay the whole or any part of the income of her share to her husband, Herbert Mercer, during the period that he continued a widower. On the construction of the settlement of 1924, it appears to me to be plain that the husband would not get any interest in the fund unless after the execution of the settlement—namely, after July 2, 1924—Mrs. Mercer by her will appointed that interest to him. On the language of the will and codicil it may well be that, if after that date she had executed her will or confirmed it by a further codicil, the same result would have occurred as occurred in the case of the 1918 settlement. But, although she lived for some years after the execution of the 1924 settlement, she did not make any further codicil, and it is impossible for me to hold that she did anything after July 2, 1924, which created an interest in her husband. The only authority given to her by the settlement is to do something in the future, the effect of which would be to give an interest to her husband. I mentioned that it is agreed on all hands that ss. 24, 27, of the Wills Act do not apply, and I must deal with the case as though they had never been enacted. If there had been any statutory provisions on the lines of s. 24 of the Wills Act, which provided that for such a purpose as that with which I have to deal the will and codicil should take effect as if they had been executed immediately before the death of the testatrix, that would have produced exactly the same result as regards the 1924 settlement as has been produced, in my view, by the republication of the will after 1918 in respect of the fund comprised in the 1918 settlement. In my view, I cannot treat a testamentary disposition which has been made in the year 1919 of a testatrix who died in 1929, as having been executed in 1929 immediately before her death. If I could the result would be different.

Solicitors for all parties: *Withers & Co.*

H. C. H.

FUEL ECONOMY COMPANY, LIMITED *v.* MURRAY.

C. A.
1930
LUXMOORE J.
April 8, 9.
C. A.
April 29, 30.

Patent—Practice—Licensee—Licence to manufacture and sell within limited Area—Sale outside Area—Action for Infringement—Defence of Invalidity —Estoppel—Application to strike out Pleadings refused.

The rule that the licensee of a patent is estopped from denying the validity or the novelty of his licensor's patent is limited to proceedings in which the licensee is sued as such, and does not apply in an action for infringement of patent by making and selling the patented article in a manner and to an extent in and to which the licence would be no defence.

The defendant was a licensee of a patent for the making and fitting of boiler joints, the licence being limited to the counties of Northumberland, Durham, Lincoln and part of Yorkshire, and entitled under the terms of the licence to trade under a certain registered business name within that limited area. He traded in the patented articles and in the said business name outside that area, whereupon the plaintiffs, who were the owners of the patent, brought an action against him for infringement and passing-off. The licence was referred to in the pleadings for the purpose of defining the limited area within which it was available to the defendant. The defendant by his defence pleaded that the patent was invalid by reason of objections, particulars of which were given, and also for want of novelty. The plaintiffs moved to strike out the paragraphs setting up the invalidity of the patent and the particulars of objections, on the ground that the defendant as a licensee was estopped from denying the validity of the patent:—

Held, by the Court of Appeal (affirming Luxmoore J.), that the objection failed, as the defendant was not sued as licensee, but as a stranger for infringement outside the area for which the licence was available.

Clark v. *Adie* (*No.* 2) (1877) 2 App. Cas. 423; (1876) 3 Ch. D. 134 discussed and distinguished.

MOTION.

The following statement of the facts is taken from the judgment of Luxmoore J.:—

The plaintiffs are the Fuel Economy Company, Ld., and in para. 1 of the statement of claim it is stated that they are and have at all material times been the registered legal owners of two letters patent in respect of "improvements in steam boilers and the like," one granted to a gentleman named Jackson, and the other granted to a gentleman named Bowden.

Para. 2 states that the letters patent are and have at all material times been valid and subsisting. Para. 3 sets out that:

"The plaintiffs are and have at all material times been manufacturers factors and fitters of boiler joints constructed in accordance with the said letters patent and have extensively used the words 'Bowden-Jackson' upon and in connection with the said joints. Joints constructed in accordance with the said letters patent are widely known to and enjoy a high reputation among engineers and users of steam boilers as 'Bowden-Jackson' joints and the words 'Bowden-Jackson' when used upon or in connection with boiler joints mean and are understood to mean that the said joints are constructed in accordance with one or more of the plaintiffs' letters patent." Then para. 4 sets out an indenture dated May 10, 1922, and the plaintiffs claim to refer to it at the trial for its full terms; it states that: "the plaintiffs granted an exclusive licence to one Charles Graham his executors administrators and assigns to use the said two first named letters patent for the respective terms thereof in the counties of Lincoln Northumberland Durham and a certain area of the county of York. The defendant claims to be and is beneficially entitled to the said licence as purchaser of the grantee's interest therein from the trustee in bankruptcy of the said grantee and is accordingly a licensee under the two letters patent specified in the said indenture. By virtue of the terms of the said licence the defendant carries on business under the style of 'The Bowden-Jackson Patent Expansion Boiler Joint Company.'" Para. 5 states that: "The defendant has infringed the said letters patent in manner in the herewith delivered particulars of breaches appearing."

The particulars of breaches which are relied on are in respect of matters outside the limited area defined in the licence. Then in para. 6 of the statement of claim the plaintiffs put forward an alternative claim: "Alternatively, the defendant in order to obtain for himself the reputation acquired by the plaintiffs and to pass off boiler joints of a construction other than that described and claimed in the said letters patent as and for joints constructed in accordance with the said letters patent or any of them and to deceive purchasers thereof has offered for sale and/or invoiced and/or sold and/or installed boiler joints made otherwise than in accordance with the said letters patent or any of them and has by means of leaflets booklets catalogues quotations estimates letters and verbal representations wrongfully applied the name 'Bowden-Jackson' to the said joints."

Then in the prayer of the statement of claim the plaintiffs claim relief, first, an injunction to restrain the defendant from setting or causing to be set or offering or circularizing customers with offers to set any boilers made in accordance with the letters patent elsewhere than in the limited area defined in the licence; and secondly, an injunction to restrain passing-off.

It is worthy of notice that no relief is claimed under the licence at all, and there is, therefore, really no need to have pleaded the licence; in fact, it was only necessary to refer to it in order to explain why the relief sought in the first injunction excludes the area covered by the licence.

The action is a two-fold action; it is an action to restrain infringement of letters patent, and it is also brought to restrain passing-off.

Para. 1 of the defence is simply a non-admission of the statement in para. 1 of the statement of claim—namely, that the plaintiffs are entitled to their letters patent. Para. 2, which is one of the two paragraphs in the defence complained of, states that: "Each of the letters patent sued on is invalid for the reasons appearing in the particulars of objections delivered herewith." I need not trouble with the particulars of objections. They simply state that each of the letters patent is invalid. Then para. 3 states that: "At the date of the said letters patent, the apparatus made by the defendant and complained of in this action was not novel." That again amounts to a plea of invalidity of the patent. The ground on which it is said these paragraphs must be struck out is that the defendant admits that he is a licensee in a subsequent part of the defence, and that by reason of such admission he is estopped from denying the validity of the letters patent or either of them. The alleged admission is said to be in para. 6 of the defence, which is in these terms: "The defendant admits the said indenture of May 10, 1922, and craves leave to refer to the same for the terms thereof. The defendant is a licensee under the two letters patent specified in the said indenture only within the limited area specified in the said indenture. Save as above the several allegations in para. 4 of the statement of claim are not admitted."

To understand the complaint made by the plaintiffs, it is necessary also to consider paras. 5 and 8 of the defence. In para. 5 the defendant says: "The defendant in 1922 commenced trading as a boiler and steam plant engineer under the name of 'The Bowden-Jackson Patent Expansion Boiler Joint Company' which title was registered under the Business Names Act, 1916, certificate No. 169,651. The words 'Bowden-Jackson' when used upon or in connection with boiler joints mean and are understood to mean boiler joints constructed and/or installed by the defendant."

In para. 8 the defendant says: "The defendant admits the sending out of the booklet marked G.M.3."—which is identified by reference to an affidavit—and he sets out the names of the persons to whom it was sent. Then he goes on: "The said booklet was sent out in order to draw the attention of possible customers to the advantages of fitting expansion joints to their boilers and to advertise the name 'Bowden-Jackson' under which the defendant trades. Letters and correspondence addressed by the defendant to customers and members of the trade have been on paper on which is the heading 'Sole Proprietor of the Murray Air Excluding and Anti Short-Circuiting Appliances for Lancashire Boilers.' The defendant denies that he has attempted to obtain for himself any reputation acquired by the plaintiffs and also that the plaintiffs have acquired any reputation as alleged in para. 6 of the statement of claim or at all. The defendant denies that he has attempted to pass off boiler joints of a construction other than that described and claimed in the said letters patent as and for joints constructed in accordance with the said letters patent or any of them or to deceive purchasers thereof as alleged in para. 6 of the statement of claim or at all. The name 'Bowden-Jackson' applied to boiler joints does not mean exclusively joints made in accordance with the said letters patent or any of them, but means joints constructed and/or installed by the defendant."

So far as those two paragraphs are concerned they are only aimed at the claim in the action for passing-off, and, as I read the defendant's defence, he is in no way saying that he is a licensee of the patent, and that that is an answer to the claim for infringement. Perhaps in face of this sort of plea it would not be permissible to set up a plea of invalidity of the patent as well, but I do not think this point arises, and I will therefore say nothing more about it.

Moritz K.C. and *K. E. Shelley* for the plaintiffs. The defendant affirms the licence and therefore the patent as regards Yorkshire, but attacks it as regards Lancashire and other districts outside his limited area. He admits that he is a licensee within that limited area, and in those circumstances paras. 2 and 3 of the statement of claim are embarrassing and ought to be struck out. A licensee cannot in any action raise any objection to the validity of his licensor's patent: *Adie* v. *Clark* (1), per James L.J. The principle of estoppel applies. It is not open to a licensee to plead that if the patent is good he holds a licence under it, and alternatively that the patent is bad: *Post Card Automatic Supply Co.* v. *Samuel.* (2) In *Crossley* v. *Dixon* (3) a limited licence was granted to the defendant to use the machines supplied to him by the plaintiff but no others. The defendant bought some machines covered by the patent from another person, and in the action against him it was held that he could not dispute the validity of the patent. There the limitation of the licence was as to user, here it is as to place, but the same principle applies, and the defendant is estopped from denying the validity of the patent, or pleading want of novelty.

(1) 3 Ch. D. 134, 144; on appeal sub nom. *Clark* v. *Adie* (No. 2) 2 App. Cas. 423.

(2) (1889) 6 R. P. C. 560.

(3) (1863) 10 H. L. C. 293.

Roger North for the defendant. The present case is not covered by *Crossley* v. *Dixon* (1), as that was an action for royalties; this is an action for infringement and passing-off. In *Crossley* v. *Dixon* (1) the defence of invalidity was set up in answer to the claim for royalties. Here the defendant is not a licensee in respect of the infringements he is said to have committed, and he is not sued as a licensee but as a stranger. The licence is only mentioned in the pleadings in order to define the limited area, outside of which the cause of action has arisen. An estoppel by deed does not operate outside the deed: *Carpenter* v. *Buller* (2); it can only operate in the same transaction as that in which it arises: *Compania Naviera Vasconzada* v. *Churchill & Sim.* (3)

The question of estoppel as between licensor and licensee is analogous to the same doctrine as between landlord and tenant: *Clark* v. *Adie* (*No.* 2) (4), per Lord Blackburn; *Cutler* v. *Bower.* (5)

[*Moritz K.C.* The pleading of the licence is essential. The action is divided into two parts, one for infringement of the patent and the other for passing-off. The defence to the action for passing-off boiler joints as "Bowden-Jackson" joints involves the pleading of the licence as the only justification for the use of the name.]

North. An estoppel operates only where there is mutuality between the parties: Comyn's Digest, p. 194, tit. Estoppel.

[He also referred to *Hall* v. *Conder* (6); *Trotman* v. *Wood* (7); *Hayne* v. *Maltby* (8); *Watts* v. *Everitt Press Manufacturing Co.* (9)]

Moritz K.C. in reply. In *Crossley* v. *Dixon* (1) there was an allegation of infringement, and the plaintiff elected to rely on it at the trial. The allegation of infringement compels the defendant to rely on his licence as a defence, and when he does that he cannot plead invalidity.

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(1) 10 H. L. C. 293.
(2) (1841) 8 M. & W. 209, 212.
(3) [1906] 1 K. B. 237, 251.
(4) 2 App. Cas. 423, 435.
(5) (1848) 11 Q. B. 973.
(6) (1857) 2 C. B. (N. S.) 22, 43.
(7) (1864) 16 C. B. (N. S.) 479, 497.
(8) (1789) 3 T. R. 438.
(9) (1910) 27 R. P. C. 400.

[He referred also to *Neilson* v. *Fothergill* (1) and *Franklin Hocking & Co., Ld.* v. *Franklin Hocking*. (2)]

LUXMOORE J. This is a summons to strike out two paragraphs in a defence delivered by the defendant in this action on the ground that they are unnecessary and may tend to prejudice embarrass and delay the fair trial of the action and disclose no reasonable answer having regard to the admissions contained in para. 6 of the defence.

To understand the claim I think it is necessary to consider the nature of the action as disclosed in the statement of claim, and then consider the defence with reference to the statement of claim. [His Lordship having stated the effect of the pleadings, proceeded :] The fact is that the action does not relate to anything which has been done under the licence, nor does the defence set up the licence as an answer to the claim for infringement. There is, of course, a well recognized rule that a licensee cannot attack the validity of a patent which is the subject of his licence, and Mr. Moritz quoted to me a passage from the judgment of James L.J. in *Adie* v. *Clark* (3), where he said this : "A licensee cannot, under any pretence whatever, bring his licensor into litigation as to the novelty of any part of the patent." I think that statement must be read in relation to the subject-matter of the proceedings in which it was made. The action was an action for specific performance of an agreement to take a licence and for an account under such licence of the articles made by the defendant. The reason why a licensee cannot dispute the validity of the patent in respect of which a licence is granted arises out of the relationship of the parties, the licensor and the licensee, which creates an estoppel. Estoppel can only operate in the same transaction as that in which it arises. In an action under a lease, the lessee cannot challenge the lessor's title to property which is included in the lease, because the title to that is not in issue ; and the case of a licensee who has a licence to work a patent is to that extent analogous to that of a lessee under a lease. A licensee cannot challenge the validity of a patent in an action under the licence, the licence being admitted by the licensee, because the title is not in issue. But in an action for infringement a different set of circumstances arises altogether. It is not an action under the licence at all, and in such a case, in my judgment, no estoppel arises. If this were an action under the licence, for example, to recover royalties in respect of articles made under the patent in the limited area, of course, the defendant, as licensee, would be estopped from challenging the validity of the patent, the licence being admitted by him, no matter how obviously invalid the patent might be. But, in my judgment, such an estoppel cannot arise in an action for infringement. In the present case, so far as the infringement complained of is concerned, the licence has no bearing on the case, and is really irrelevant to the plea. As I have already said, it is really only referred to in the statement of claim in order to explain the limitation which has been placed on the relief sought, by excluding the area covered by the licence from that relief.

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(1) (1841) 1 Webs. R. P. C. 287.

(2) (1888) 6 R. P. C. 69.

(3) 3 Ch. D. 134, 144.

My attention has been called to a number of authorities. I do not think it is necessary to refer to any of them except *Crossley* v. *Dixon.* (1) I refer to that case because it is said that it lays down quite clearly that in an action for infringement a licensee cannot challenge the validity of a patent. In my view, that judgment decides no such thing. *Crossley* v. *Dixon* (1) was, in fact, an action to recover royalties under a licence. It does not appear clearly from the statement of the facts in the case what were the precise terms of the licence, but I think it does appear from what was said by Lord Westbury during the argument and in the course of his speech that the licence contained an agreement to pay royalties not only in respect of articles made under the licence but also in respect of articles made outside the licence, so long as such articles embodied the particular subject-matter of the patent in that action; because it appears that in the course of the argument it was stated

(1) 10 H. L. C. 293.

that the action itself was an action to recover royalties not only in respect of articles made by the plaintiff which were obviously within the licence, but also in respect of articles which had been made by a firm other than the plaintiff's. The claim was for royalties in respect of all those machines. The bill went on to claim in the alternative, I presume, that the machines made by the firm other than the plaintiff's were, in fact, infringements of the plaintiff's patent. In answer to the claim the defendants appear to have denied that they were liable to pay any royalties in respect of machines made outside the licence by the other firm, but they went on to say that so far as the machines made by the other firm were concerned, they did not infringe the plaintiff's patents, and then challenged the validity of the patents. It appears quite clearly, I think, from what Lord Westbury said (1), that at any rate at some stage during the hearing it was admitted by the respondent that he was liable to pay not only on machines made by the plaintiff, but also on those made by other persons which embodied the invention, and that being admitted and the action then being an action to recover royalties under it, it is quite plain that the defendant would be estopped from denying the validity of the patents in respect of which royalties, admitted to be payable under the licence, were to be paid. In my view, that is the real explanation of the decision in *Crossley* v. *Dixon* (2), and the only ground under which the royalties eo nomine could be recovered in that action was that there was an agreement in the licence to pay in respect of the particular patents the royalties in question. If that is so then it seems to me obvious that the licensee, having admitted the licence, could not challenge the validity of the patent.

In my view, there is no embarrassment caused by the plea which has been set up by the defence in this action, and I see no ground for saying in view of the form of the defence that paras. 2 and 3 disclose no reasonable answer to the plaintiffs' claim. That being so, I see no ground on which I can direct that paras. 2 and 3 of the defence should

(1) 10 H. L. C. 293, 299.

(2) 10 H. L. C. 293.

be struck out. The motion fails, and no order will be made upon it except that the costs of the motion will be costs in the action.

A. R. T.

The plaintiffs appealed. The appeal was heard on April 29 and 30, 1930.

Moritz K.C. and *K. E. Shelley* for the plaintiffs.

Sir Duncan Kerly K.C. and *Roger North* for the defendant.

The arguments were substantially the same as those used in the Court below.

The following additional cases were referred to: *Gillette Safety Razor Co., Ld.* v. *A. W. Gamage, Ld.* (1); *Basset* v. *Graydon.* (2)

LORD HANWORTH M.R. This is an appeal from an order of Luxmoore J., who refused to make an order upon a motion made before the Court, that paras. 2 and 3 of the defence should be struck out.

The action is brought by the Fuel Economy Company against George Murray, trading as the Bowden Jackson Patent Expansion Boiler Joint Company. The claim made against him is that the plaintiffs are the registered legal owners of three patents, and that those patents are valid and subsisting. The plaintiffs say that by an indenture of licence the plaintiffs granted an exclusive licence to one Charles Graham to use the first two named letters patent for a specific area—namely, the area of the counties of Lincoln, Northumberland, Durham, and a certain portion of the county of York. Then they say: "The defendant claims to be and is beneficially entitled to the said licence as purchaser of the grantee's interest therein"—that is, of the interest of Charles Graham—"from the trustee in bankruptcy of the said grantee" and so, the plaintiffs say, the defendant is the licensee under the two letters patent, which are specified in the indenture. Then they allege that the defendant has infringed the letters patent in a particular manner. They have delivered particulars of those breaches, and it appears from those particulars that the defendant has, so they say, infringed the letters patent by carrying on negotiations and correspondence in, and by issuing booklets over, an area in Nottinghamshire, Leicestershire and Berkshire.

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(1) (1908) 25 R. P. C. 492; (1909) 26 Ibid. 745.

(2) (1897) 14 R. P. C. 701.

There is another claim in respect of passing off boiler joints as being constructed in accordance with the letters patent. I need not trouble about that part of the action.

The prayer founded upon the matters to which I have adverted is that an injunction may be granted restraining the defendant, his servants, agents or workmen from setting or causing to be set or circularizing customers with offers to set any of these boilers, during the continuance of the three letters patent, elsewhere than in the prescribed area which is the subject-matter of the licence.

The defendant raised in his defence, by para. 1, the usual traverse of the allegations made. In para. 2 he says affirmatively: "Each of the said letters patent sued on is invalid for the reasons appearing in the particulars of objections delivered herewith." Then, in para. 3, he says: "At the date of the said letters patent the apparatus made by the defendant and complained of in this action was not novel."

The plaintiffs thereupon ask that those paragraphs should be struck out on the ground that they are unnecessary and may tend to prejudice, embarrass and delay the fair trial of the action, and as disclosing no reasonable cause of answer having regard to the admissions contained in para. 6 of the defence. Para. 6 of the defence admitted the indenture of licence of May 10, 1922.

This application is made under r. 27 of Order XIX., which provides: "The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action."

The plaintiffs say that the defendant, having admitted in para. 6 the effect of the indenture of May 10, 1922, and that he is a licensee within this limited area, cannot step outside the implications involved in his being a licensee, and challenge, as he does in paras. 2 and 3, the validity of the letters patent, of two of which, though not of three, he is the licensee; that he is pleading inconsistently; that he is approbating and reprobating; and that he is thus taking up a situation which is embarrassing to the plaintiffs, and which the Court ought to remedy under r. 27.

I only desire to say in passing that, with reference to the powers of the Court under that rule, it must not be overlooked that under our present practice we are more lax than we used to be under the stricter and, perhaps, better rules of pleading that obtained under the Common Law Procedure Act, 1854. It is not every pleading that offends against the rules which will be struck out. The applicant who asks for a portion of a pleading to be struck out must show that he will be seriously embarrassed. It is quite true that the plaintiffs give grounds for saying that they will be embarrassed, because they say: "If we are to go into the validity of the patent, important issues will be raised in the action which are really irrelevant to the primary claim made by the plaintiffs against the defendant. We say that he, as an admitted licensee, must be treated as admitting the validity of the patents, and that what he has done in the area of Nottinghamshire, Leicestershire and Berkshire is an infringement which cannot be permitted, and that he cannot and ought not to be allowed to raise any question of the validity of the patents while he holds under the plaintiffs as a licensee of these two patents."

Saying no more, therefore, on the question of whether or not it is a convenient course to strike out a portion of the pleadings, I turn to the question whether the plaintiffs have established that the defendant is estopped from raising the two issues mentioned in paras. 2 and 3 of the defence. The matter stands in this way. The plaintiffs say that the licence to the defendant within a certain area has been accepted by him, and that whilst it is current, it is not possible for the defendant to dispute the validity of the patents which are involved in that licence. The analogy of the case of landlord and tenant is relied upon. It is said that, just as a tenant cannot dispute the title of his landlord under whom he went into occupation and to whom he has attorned, so it is not possible for the defendant to dispute the validity of the patents belonging to the plaintiffs, of which he holds a licence.

We are by no means satisfied that this estoppel covers the whole area of the claim made by the plaintiffs in this action. It is to be observed that the licence is limited in area. More than that, it is not easy to decide, before the facts are finally determined, how specific the estoppel is which binds the defendant.

It has been said in *Noton* v. *Brooks* (1), to which I called attention, that a licensee may well be content to accept a licence on this sort of reasoning: "You have a patent; I do not want to trouble myself about whether it is good or bad; but so long as you allow me to use your invention, I will pay you a royalty for the use of it." Bramwell B. says (2): "The consideration for the promise to pay is the permission to use the invention." In other words, there is not an absolute estoppel in all cases and in all circumstances on the part of the licensee under which he is prevented from at any time and under any circumstances saying that the patent is invalid, but only an estoppel which is involved in and necessary to the exercise of the licence which the licensee has accepted.

Turning to *Adie* v. *Clark* (3), to which we have had our attention called, James L.J. says (4): "Of course it is said that as licensee it is not competent to the defendant to dispute the validity of the patent, and it is admitted, therefore, that the documents cannot be used directly to shew want of novelty. But they are made available and used in this way. A licensee is entitled to shew the limits of the patent, and that he is outside those limits. And in construing a patent this is always to be observed, that you will so construe it as that it shall be a valid and not a void patent."

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(1) (1861) 7 H. & N. 499.
(2) Ibid. 504.
(3) 3 Ch. D. 134.
(4) Ibid. 142.

That case went to the House of Lords (1), and there are passages which are of importance in Lord Blackburn's judgment. He puts the estoppel in this way (2): "If he [the licensee] has used that which is in the patent, and which his license authorizes him to use without the patentee being able to claim against him for infringement, because the license would include it, then, like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty. Although a stranger might shew that the patent was as bad as any one could wish it to be, the licensee must not shew that. Taking that to be the rule, and I think the analogy between the two is perfect, the question in a suit in which a patentee is claiming royalty from his licensee is, whether what the licensee has done is included in the patent which the patentee or licensor had, and which he gave him license to use? That must depend entirely upon the construction of the specification."

I agree with Sir Duncan Kerly that close attention to that passage is required. It is to be observed that when Lord Blackburn says: "If he has used that which is in the patent, and which his license authorizes him to use without the patentee being able to claim against him," he has laid down two conditions. He is pointing out that the acceptance of the licence does not cover the action of the licensee in all cases and in all circumstances relative to any user of the patent, but that it must depend upon the construction of the specification and of the licence to see whether or not the action of the licensee is restrained by his acceptance of the licence and the estoppel which arises therefrom. There is a passage to which I called attention in Lord Cairns' judgment, which, although not so clear, is worth observing. He says (3): The licensee "is of course entitled to have it ascertained what is the ambit, what is the field, which is covered by the specification as properly construed; and he is entitled to say: Inside of that field I have not come; so far as I have worked I have worked outside the limit which is covered by it, as properly construed, and therefore I am not bound to make any of those payments which are stipulated in my license as payments to be made for working the patent." It is a fair criticism upon that passage to say that the Lord Chancellor appears to be considering what is within the field of the patent; but the reasoning that led him to make that limitation seems to apply to the case of a patent which is limited in area. As was pointed out by Mr. North, it is possible, under s. 14 of the Patents and Designs Act, 1907, to which he called our attention, to make an assignment of a patent for user in a particular area in this country, and, therefore, the limitation of a patent need not be as to what is covered by the field of the specification, but its user may be limited to a particular geographical area.

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(1) Sub nom. *Clark* v. *Adie* (*No.* 2) 2 App. Cas. 423.

(2) 2 App. Cas. 436.

(3) Ibid. 423, 426.

With those authorities before us it does not seem possible to preclude the defendant at the present time from raising the issues in question.

The matter is dealt with by the late Mr. Spencer Bower in his book on Estoppel by Representation. He says at p. 294, s. 313: "Analogously, a licensee is not precluded from discussing the exact extent and boundaries of the patent rights of his licensor, and from setting up that his own operations did not come within the ambit of those rights; for this is not to dispute the existence or validity of such rights, whatever they are, which is all that he is estopped from controverting."

Both on principle and in the light of the cases cited to us, it would seem wrong to prevent the defendant from raising the issues in the paragraphs in question, and, although factors may later emerge which will inure to the benefit of the plaintiffs as against the defendant, it would appear that the licence is not a complete estoppel against the defendant under all circumstances and in all areas, but that it must have some limitation.

On these grounds, therefore, we think it right to confirm the order of the learned judge, and to refuse the application to strike out those paragraphs.

For these reasons the appeal will be dismissed with costs.

LAWRENCE L.J. I agree.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Helder, Roberts & Co.*

Solicitors for respondent: *Piesse & Sons, for Hugh Prince, Leeds.*

W. I. C.

LUXMOORE J.
1930
April 1, 10.

PILKINGTON *v.* UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES, LIMITED.

[1930. P. 797.]

Company—Issue of Stock Warrant to Bearer—Legality of—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 27, 31—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 37, *sub-s.* 5; *ss.* 38, 285—*Companies Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 23)—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 50, *sub-s.* 1 (*c*); *s.* 62, *sub-s.* 2; *ss.* 70, 71, 72, 95, 97, *sub-s.* 1; *ss.* 108, 380; *Table A, arts.* 30, 31, 32, 33.

There is nothing in the Companies Act, 1929, that, expressly or by implication, deprives a company of the power to issue warrants to bearer in respect of stock.

MOTION.

This was a motion to restrain the defendant company from issuing any stock warrants to bearer except as authorized by the United Railways of the Havana and Regla Warehouses, Ld., Act, 1906. The company was incorporated on February 8, 1898, with liability limited by shares, under the Companies Acts, 1862 to 1893. The original capital of the company was 1,540,000*l.*, divided into 154,000 shares of 10*l.* each. In 1905, by special resolutions, the classes of capital of the company were changed into ordinary and preference shares and stock. Before 1906 the company had issued warrants to bearer under the provisions of the Companies Act, 1867. The Act of 1906 empowered the company to issue warrants to bearer under certain conditions, and further warrants to bearer were issued by the company in respect of stock constituted under that Act. The capital of the company had been increased from time to time, and now consisted of preference stock, deferred ordinary stock, and ordinary stock.

The question now raised was whether the company was debarred under the provisions of the Companies Act, 1929, from issuing further stock warrants to bearer.

J. B. Lindon for the motion. There is no provision in the Companies Act, 1929, for the issue by a company of share warrants in respect of stock, and that Act has, therefore, by implication repealed the provisions of the previous Acts. The Act of 1929 contains amendments of earlier Acts, and is not, therefore, purely a consolidation Act. In s. 97 the word " share " cannot be construed as including stock. That is evident from the wording of sub-s. 1 (*b*). Again in s. 108, relating to the annual return to be made by companies, the wording of sub-s. 3 (*m*) makes it clear that nothing in that section can apply to stock. Then in Table A to the Act, arts. 30, 31, 32 and 33 deal with the conversion of shares into stock, but there are no articles relating to the issue of warrants to bearer in respect of stock. In *Bank of England* v. *Vagliano Bros.* (1) Lord Herschell deals with rules of construction to be applied to Acts consolidating and amending former Acts.

[He also cited *In re Irrigation Company of France* (2) and *Thomas* v. *United Butter Companies of France.* (3)]

Gordon Brown for the defendant company. *Bank of England* v. *Vagliano Bros.* (4) was on a codifying Act. In *MacConnell* v. *E. Prill & Co., Ld.* (5), Sargant J. deals with the prima facie presumption in the case of a consolidating Act. These warrants to bearer in respect of stock were authorized by s. 27 of the Act of 1867. That was reproduced by s. 37 of the Act of 1908, and no alteration was made in the Act of 1928. It is obvious that the omission of the word "stock" in s. 70 of the Act of 1929 is unintentional.

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(1) [1891] A. C. 107, 144.
(2) (1871) L. R. 6 Ch. 176.
(3) [1909] 2 Ch. 484.
(4) [1891] A. C. 107.
(5) [1916] 2 Ch. 57, 63.

Cur. adv. vult.

April 10. LUXMOORE J. The defendant company had before the passing of the 1906 Act issued warrants to bearer in respect of the original ordinary share capital which had been converted into ordinary stock, and also in respect of the preference shares which had also been converted into preference stock. This had been done under the provisions of the Companies Act, 1867. Sect. 27 of that Act provided that: "In the case of a company limited by shares the company, if authorised so to do by its regulations as originally framed or as altered by special resolution, and subject to the provisions of such regulations, may, with respect to any share which is fully paid up, or with respect to stock, issue under their common seal a warrant stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the share or shares or stock included in such warrant, hereinafter referred to as a share warrant." Then follow in the succeeding sections, down to and including s. 36, a number of provisions applicable to warrants relating either to shares or stock, but there is one provision at any rate which is applicable only to warrants to bearer relating to shares and not to stock. I refer to the provision in s. 31, which requires the entry in the register of a statement in which each share included in a warrant to bearer is to be distinguished by its number. I should also state that the group of sections dealing with warrants to bearer relating to shares or stock appear together in the 1867 Act under the heading "Share Warrants to Bearer," and there is no definition in that Act, which provides that share shall include stock or vice versa.

After the passing of the Act of 1867 it became a common practice to insert in the articles of association of a company with liability limited by shares powers to convert fully paid shares into stock, and to issue warrants to bearer in respect of shares or stock. I assume that the defendant company had in fact taken such powers, for, before 1906, the defendant company had converted shares into stock, and had issued stock warrants to bearer.

After the passing of the defendant company's Act of 1906 further warrants to bearer were issued by the defendant company in respect of the stock constituted under that Act. No question is raised as to the validity of these bearer warrants. It is admitted that they have been properly and validly issued; but the company proposes to issue warrants to bearer in respect of the unissued shares when fully paid up and converted into stock.

It is to test the validity of the defendant company's proposals that this motion has been launched. It is argued that the Companies Act, 1929, has by implication repealed the provisions of the previous Companies Acts relating to the issue of bearer warrants in respect of stock while keeping unaltered the provisions with regard to the issue of bearer warrants in respect of shares. No reason is suggested for the repeal of these provisions in respect of stock and their retention in respect of shares. This differentiation between stock and shares, if it has in fact been effected, would appear to be of an arbitrary nature, and none the less so having regard to the fact that the stock warrants to bearer outstanding at the date when the 1929 Act came into force admittedly remain valid and in force. As I have already stated, the answer to the question depends on the construction to be placed on the material sections of the Companies Act, 1929, and I propose to refer to these sections, but before doing so it is necessary to trace the development of the provisions contained in the Act of 1867 down to the date of the 1929 Act. The provisions of the 1867 Act remained in force and unaltered down to the passing of the Companies (Consolidation) Act, 1908. The Consolidation Act of 1908 incorporated the provisions of ss. 27 to 32 inclusive of the Act of 1867 in s. 37, and the provisions of ss. 34 to 36 inclusive in s. 38, but beyond mere verbal alterations consequential on such incorporation, the provisions of the two Acts are for all practical purposes the same, and, in particular, sub-s. 5 of s. 37 of the 1908 Act reproduces the provisions of s. 31 of the Act of 1867 in requiring the entry in the register, where warrants to bearer are issued, of particulars including (ii.) "a statement of the shares or stock included in the warrant, distinguishing each share by its number." The Act of 1908 contains a definition section (s. 285), and in that section "share" is defined as meaning "share in the share capital of the company, and includes stock except where a distinction between stock and shares is expressed or implied."

The next Act to consider is the Act of 1928. This Act was passed for the purpose of amending the Companies Acts, 1908 to 1917, and besides making important and substantial amendments in those Acts, it also makes many minor amendments which are collected and specified in the Second Schedule to the Act of 1928. Neither in the substantial amendments contained in the Act itself nor in the minor amendments set out in the Second Schedule is there any reference to, or any amendment of, the existing provisions as to warrants to bearer whether relating to stock or shares.

The Act of 1928 was followed by the Companies Act, 1929, which is said to have altered the law with regard to stock warrants to bearer as opposed to share warrants to bearer.

Before I deal with the material sections it is necessary to remember that the 1929 Act is described as an Act to consolidate the Companies Acts, 1908 to 1928, and certain other enactments connected with the said Acts, but, as Mr. Lindon pointed out, the 1929 Act is not purely a consolidation Act, for it does contain amendments of the earlier Acts.

I call attention to this fact because it is said that different canons of construction apply to an Act which is purely a consolidating statute and to an Act which is an amending Act, though in my view little if anything turns on it, for even in a consolidating Act the construction of any particular provision must depend on the meaning of the words used, and if that meaning is plain, even though an alteration in the existing law results, the words which fall to be construed must be so construed.

Now, the material sections of the 1929 Act are ss. 50, 62, 70, 71, 72, 95, 97, 108 and 380. Sect. 380 is a definition section, and in it is a definition of the word "share" in the same terms as are to be found in s. 285 of the 1908 Act, that is, "share" means share in the share capital of a company, and includes stock except where a distinction between stock and share is expressed or implied. Sect. 50 confers powers on the company, if authorized by its articles, to alter its share capital, including in sub-s. 1 (*c*) power to "convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination." Sect. 62, sub-s. 2, provides that: "Each share in a company having a share capital shall be distinguished by its appropriate number." Sect. 70 provides for the issue of share warrants to bearer. It is in these terms: "(1.) A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant. (2.) Such a warrant as aforesaid is in this Act termed a 'share warrant.' (3.) A share warrant shall entitle the bearer thereof to the shares therein specified, and the shares may be transferred by delivery of the warrant." Sects. 70 and 71 relate respectively to personation of a shareholder, and to offences in connection with share warrants. I need not refer to them in detail; it will be sufficient to notice that in those sections there are references to share warrants, and there is, apart from the definition in s. 380, no reference to stock warrants. Sect. 95 provides that every company shall keep "a register of its members, and enter therein the following particulars: (*a*) The names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member; (*b*) The date at which each person was entered in the register as a member; (*c*) the date at which any person ceased to be a member." Then follows this proviso: "Provided that, where the company has converted any of its shares into stock and given notice of the conversion to the registrar of companies, the register shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares specified in para. (*a*) of this sub-section." Then sub-s. 2 provides: "If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine." Down to this point it is clear that reference to shares except in s. 62, sub-s. 2, in the sections to which I have referred, is not required by the context to be limited to "shares" in the strict meaning of the word when compared with stock, but can and should properly be construed, in accordance with the requirement of the definition in s. 380, as including stock.

The next section is s. 97. This is the first section on which Mr. Lindon, in substance, bases his argument. Sub-s. 1 provides: "On the issue of a share warrant the company shall strike out of its register of members the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars—namely: (*a*) The fact of the issue of the warrant; (*b*) a statement of the shares included in the warrant, distinguishing each share by its number; and (*c*) the date of the issue of the warrant." Mr. Lindon says that in this section the word "share" cannot be construed as including stock because, to apply the words of the definition, a distinction between stock and shares is at least implied, if not expressed.

In my view, this argument is not well founded. It is conceded that share can properly include stock throughout the whole of s. 97, except in sub-s. 1 (*b*), where the phrase "distinguishing each share by its number" is to be found —obviously this cannot apply to stock, for stock from its nature cannot have a number assigned to it, and consequently having regard to the definition, it is plain that in this phrase share must have its restricted meaning, but that is a very different thing to saying that because it has its restricted meaning in this phrase, the word "share" in the other parts of the section must also have the same restricted meaning that is necessarily required in sub-s. 1 (*b*), although in such other parts of the section there is nothing either express or implied to require the restriction. In my view so to construe the section would result in a disregard of the clear direction contained in the definition section that the word "share" is to include stock throughout the Act, unless the context otherwise requires, except in those places where a distinction between stock and shares is expressed or implied. In my judgment, there is no distinction express or implied between share and stock in any part of s. 97, except in the phrase to which I have referred in sub-s. 1 (*b*).

The next section referred to is s. 108, which deals with annual returns to be made by a company having a share capital. The particulars required to be set out in the returns are set out in sub-s. 3 under various headings, each enumerated under a letter of the alphabet. In many of the enumerations the word "share" is mentioned, and in all, except one, of those enumerations "share" can quite plainly include stock. Mr. Lindon indeed frankly admitted this, but as in the case of s. 97 he argued that the fact that the particulars required under the letter (*m*), which is as follows, "The number of shares comprised in each share warrant," must necessarily be confined to shares used in the strict sense and cannot be construed as including stock. He, therefore, argued that "shares" and "share" throughout the whole section must be so confined. For the reasons I have already stated with regard to s. 97 I am unable to accept this argument. In my judgment, the words of the definition clause require the wider definition of "share" as including stock wherever it appears unless, in the actual place where the word is to be construed, there is an express or implied distinction between stock and share.

The only other fact relied upon by Mr. Lindon was that in Table A to the Act of 1929, there are no articles relating to the issue of warrants to bearer in respect of stock or shares, although there are articles (Nos. 30 to 33 inclusive) relating to the conversion of shares into stock, but I do not appreciate how this fact can assist the contention that the Companies Act, 1929, has not kept alive the power to issue warrants to bearer in respect of stock, although it has kept such power alive in respect of shares.

In my judgment, for the reasons I have stated, the Act of 1929 has, on its true construction, kept alive both powers, and consequently the plaintiff is not entitled to any such order as is prayed. The motion therefore fails.

Solicitors for the plaintiff: *Linklaters and Paines.*

Solicitors for the defendant company: *Norton, Rose & Co.*

P. J. B.

SAGAR v. H. RIDEHALGH AND SON, LIMITED.

FARWELL J.

[1928. S. 3359.]

1930
March 6;
May 6, 7, 8, 9, 16.

Master and Servant—Weaving Trade—Wages—Deduction for bad Work—Lancashire Usage—Illegality—Truck Act, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *s.* 3.

The practice in many (though not all) Lancashire weaving mills of making a small deduction as part damages for bad work from a workman's wages cannot be recognized as a good legal usage for the following reasons:—

(*a*) The actual practice varies in different mills.

(*b*) The amount of the deduction (if any), though invariably less than the damages, is at the master's discretion.

The practice is therefore neither (*a*) universal nor (*b*) reasonable or certain within the tests laid down in *Devonald* v. *Rosser & Sons* [1906] 2 K. B. 728, 741, 743, and cannot be a good legal usage.

If, as in the particular case, the deduction is made from the actual wages, and not in calculating them, it is also illegal under the Truck Act, 1831, s. 3: *Williams* v. *North's Navigation Collieries* (1889) *Ld.* [1906] A. C. 136.

Lump sum contract cases like *Farnsworth* v. *Garrard* (1807) 1 Camp. 38 and *Mondel* v. *Steel* (1841) 8 M. & W. 858, which enable an employer in his defence to an action by the contractor for that lump sum to set up damages for bad work in reduction of the claim, do not apply to the relation of master and servant.

Even if they applied, a deduction from wages made by the master at his own will would be illegal under the Truck Act, 1831, s. 3.

WITNESS ACTION.

This was an action to recover the sum of 1*s.* deducted by the defendants from the wages of the plaintiff, a cotton weaver in their employ, on account of a bad piece of weaving.

The plaintiff contended that the deduction was illegal under the Truck Act, 1831, s. 3, and claimed a declaration to that effect and payment.

The defendants justified the deduction first on the ground that the weaving price list under which the plaintiff was employed was obviously confined to merchantable cloth; secondly, that if the plaintiff sued them for the full price they could set off the actual damage in reduction of his claim, and must therefore be entitled without litigation to deduct a sum obviously less than that damage; thirdly, that the plaintiff by remaining in their mill after he knew of their

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practice had agreed to be bound thereby; and fourthly, that the practice of deducting something less than the damage caused by bad weaving was a well known custom or usage in the Lancashire cotton weaving trade.

The facts and contentions are fully set out in the written judgment.

Hon. Stafford Cripps K.C. and *Laski K.C.* for the plaintiff. First. The uniform list of prices does not mention "merchantable cloth" and is not confined thereto. Of course the plaintiff must do his best, but he does not give an absolute warranty: Beven on Negligence, 4th ed., p. 1321. In this case he has made a careless fault, and the question is whether the defendants are justified in deducting 1*s*. (*a*) from the wages due or (*b*) in calculating those wages.

The former deduction is contrary to the Truck Act, 1831, s. 3: *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (1) The latter deduction, according to *Hart* v. *Riversdale Mill Co.* (2), is not so contrary, but we reserve the right to question this decision in the House of Lords.

We will deal with the second and third points when we know exactly what they mean.

Fourthly. The defendants rely on an alleged Lancashire Trade Usage. This they must prove in fact, and show that it is certain, universal, notorious and reasonable before it can be legally recognized. It cannot be reasonable that the defendants should be judges in their own case: Co. Litt. 141*a*; *Le Case de Tanistry* (3); *Smith* v. *Hancock* (4); *Tyson* v. *Smith* (5); *Johnson* v. *Clark* (6); *Johnson* v. *Crédit Lyonnais Co.* (7); *Devonald* v. *Rosser & Sons* (8); *Robinson* v. *Mollett* (9); *Produce Brokers Co.* v. *Olympic Oil and Cake Co.* (10); *Hutton* v. *Warren* (11); *Nelson* v. *Dahl* (12); *Daun* v.

(1) [1906] A. C. 136.
(2) [1928] 1 K. B. 176, 184.
(3) (1607) Davis, 28.
(4) (1672) Styles, 137.
(5) (1838) 9 Ad. & E. 406, 421.
(6) [1908] 1 Ch. 303, 308, 311.
(7) (1877) 3 C. P. D. 32, 41.
(8) [1906] 2 K. B. 728, 733, 741, 743.
(9) (1875) L. R. 7 H. L. 802, 816, 835.
(10) [1916] 2 K. B. 296, 300.
(11) (1836) 1 M. & W. 466.
(12) (1879) 12 Ch. D. 568, 575.

City of London Brewery (1); *Holderness* v. *Collinson* (2); *Harrison* v. *Universal Marine Insurance Co.* (3); *Potter* v. *Pearson* (4); *Greenway and Barker's Case* (5); *Humfrey* v. *Dale.* (6)

The price list and tally card provided in accordance with the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 116, sub-s. 1 (*b*), contain no reference to any fine or deduction for bad work.

Cyril Atkinson K.C., *Derbyshire K.C.* and *Ormerod* for the defendants.

First. The price list does not mention wages. It gives a price for the whole piece, in this case 7*s.* 4*d.* for the 80 yards. That indicates a contract for a lump sum for a particular piece of weaving, and obviously implies merchantable cloth.

Secondly. If, as here, the plaintiff has been guilty of gross negligence he has not earned his full remuneration. In the old days he would have sued for it, and we should have counterclaimed for damages. Nowadays we can set up the negligence in our defence: *Farnsworth* v. *Garrard* (7); *Mondel* v. *Steel* (8), recognized in *Bow, McLachlan & Co.* v. *Ship "Camosun"* (9); *Dakin & Co., Ld.* v. *Lee* (10); *Thornton* v. *Place* (11); *Hughes* v. *Lenny* (12); Addison on Contracts, 11th ed., p. 889; Leake on Contracts, 7th ed., p. 42; Bullen & Leake, 8th ed., p. 829. Surely therefore, quite apart from the Lancashire usage, we are entitled to deduct a small sum obviously less than the damages without putting the plaintiff to the expense of abortive legal proceedings to recover his supposed full remuneration.

Thirdly. This has always been the practice in our mill, and the plaintiff, who must soon have become aware of it, must tacitly have agreed to be bound thereby.

(1) (1869) L. R. 8 Eq. 155, 161.
(2) (1827) 7 B. & C. 212, 216.
(3) (1862) 3 F. & F. 190.
(4) (1702) 2 Lord Raymond, 759.
(5) (1612) Godbolt, 260.
(6) (1857) 7 E. & B. 266.
(7) 1 Camp. 38.
(8) 8 M. & W. 858, 870.
(9) [1909] A. C. 597, 610.
(10) [1916] 1 K. B. 566, 569, 578, 581.
(11) (1832) 1 Moo. & R. 218.
(12) (1839) 5 M. & W. 183.

Fourthly, as to the Lancashire usage. Stoppage of wages for bad work is recognized in *Hart* v. *Riversdale Mill Co.* (1) It is also recognized in the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 1; the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), ss. 3, 11; and in the Truck Act, 1896 (59 & 60 Vict. c. 44), ss. 2, 8, 9, from the provisions of which last Act we were exempted.

The Factory and Workshop Act, 1901, s. 116, sub-s. 1 (*b*), is not really relevant, as it would be impossible to give particulars of deductions for bad work in advance. The practice is also recognized by the many abortive efforts that have been made to abolish it.

The Truck Act, 1831, s. 3, merely requires wages to be paid in current coin. It does not apply to non-payment of any part: *Chawner* v. *Cummings* (2); *Redgrave* v. *Kelly* (3); *Willis* v. *Thorp.* (4) The employer cannot of course give the weaver the damaged cloth as part of his wages: *Smith* v. *Walton* (5); nor, apart from special agreement, can he deduct anything from the amount due when ascertained: *Williams* v. *North's Navigation Collieries.* (6) But he can deduct something in calculating what the amount due really is: *Hart* v. *Riversdale Mill Co.* (1), and this is really what we have done here.

The defendants no doubt decide the amount of the deduction (if any) in the first instance, but the workman can always test that decision in the county court, which can clearly reduce the price for bad work: *In re Walkers, Winser & Hamm and Shaw, Son & Co.* (7) We avoid this risk by invariably deducting a sum obviously less than the amount of the damage. See also Halsbury's Laws of England, vol. x., pp. 253, 254; *Grissell* v. *Bristowe* (8); *Moult* v. *Halliday* (9); *Ropner & Co.* v. *Stoate, Hosegood & Co.* (10)

Hon. Stafford Cripps K.C. in reply. The lump sum contract cases, such as *Farnsworth* v. *Garrard* (11) and *Mondel* v.

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(1) [1928] 1 K. B. 176.
(2) (1846) 8 Q. B. 311.
(3) (1889) 37 W. R. 543.
(4) (1875) L. R. 10 Q. B. 383.
(5) (1877) 3 C. P. D. 109.
(6) [1906] A. C. 136.
(7) [1904] 2 K. B. 152, 159.
(8) (1868) L. R. 4 C. P. 36.
(9) [1898] 1 Q. B. 125, 128, 130.
(10) (1905) 21 Times L. R. 245, 248.
(11) 1 Camp. 38.

Steel (1), do not apply to the case of master and servant. The servant is a mere wage earner. If dismissed for gross negligence his master might possibly recover damages, but so long as the employment continues the servant is entitled to his full wages, e.g., a master could not retain a cook in his employ and deduct the cost of a brace of burnt pheasants from her wages. Of course there can be special contracts, e.g., that the servant shall pay for breakages. But apart from special contract the full wages must be paid.

No special contract to allow deductions in this case has been proved.

The alleged usage is not proved. The practice varies in different mills, so there is no universality. In this mill it is clear that the loss cannot be ascertained till long after the deduction is made. The deduction is obviously made from the actual wages and not in ascertaining them. It is really in the nature of a penalty. The alleged usage, therefore, even if proved, would be void under the Truck Act, 1831, s. 3: *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (2) It would also be void for non-compliance with the Factory and Workshop Act, 1901, s. 116, sub-s. 1 (*b*).

Cyril Atkinson K.C. in rejoinder on the second point referred to Smith's Master and Servant, 7th ed., p. 132.

Cur. adv. vult.

May 16. FARWELL J. The plaintiff claims a declaration that in respect of the wages payable to him by the defendants under his contract of service with them as a cotton weaver for the week ending August 1, 1928, he was entitled to the sum of 2*l.* 5*s.* 0½*d.* as his wages for that week, and a declaration that the defendants' deduction of 1*s.* from those wages was an illegal deduction contravening the provisions of s. 3 of the Truck Act, 1831, and payment by the defendants of the sum of 1*s.*

Although the actual amount that the plaintiff seeks to recover is small, the questions to be decided are of considerable importance and involve the consideration of an alleged usage in the cotton weaving trade in Lancashire, whereby the employers claim to be entitled to make deductions for bad work from the sums payable to the operatives for weaving. Before I state the facts proved with regard to the alleged usage it will be convenient to state shortly the facts relating to the plaintiff's employment and the position of a weaver generally.

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(1) 8 M. & W. 858.

(2) [1906] A. C. 136.

The plaintiff is twenty-three years of age, and is a cotton weaver, and is now, and has been during the whole of his working life, a cotton weaver in the employment of the defendants. The defendants carry on, and have at all material times carried on, business as cotton manufacturers in Nelson, Lancashire. The plaintiff is, and has been since July, 1920, a member of the Nelson and District Weavers' Association, which is itself a component part of the Amalgamated Weavers' Association, and the defendants are members of the Nelson Cotton Manufacturers' Association, which is itself a component part of the Cotton Spinners and Manufacturers' Association.

Before 1920 the plaintiff's father was in the defendants' employment as a weaver and, in or about the year 1919, with the consent of the defendants' manager, he took the plaintiff with him into the mill in order that he might learn the business of a weaver, and for some twelve months the plaintiff was with his father in the mill learning the business. During that time he was not in receipt of wages. At the end of that time he was engaged by the defendants as a weaver. His actual engagement was most informal, and took place in this way. One morning when he went to the mill with his father, the manager pointed out to him two looms that were not working, and said to him: "I have got two looms for you; I will see how you go on, and will give you a trial." Thereupon the plaintiff commenced work on those two looms. Since that time he has continued to work as a weaver for the defendants without any further arrangement or agreement. The number of looms entrusted to him has been increased, and in July, 1928, he was in charge of four looms. At the time the plaintiff was engaged by the defendants he knew that he would be paid wages calculated on the amount of cloth that he wove, and that the rate of payment for weaving was regulated by a scale which had been fixed between the Employers' Association, on the one side, and the Trade Unions, on the other, which applied throughout the whole trade. The method of calculating payment is somewhat complicated and it is unnecessary to refer further to the matter, except to say that it is contained in a book called "Uniform List of Prices," which was produced at the trial and is Exhibit T. S. 2.

The plaintiff, in his evidence, stated that at the time of his engagement he knew nothing of any system of fines, and he further stated that until much later he did not become aware that there was such a system in vogue in the defendants' mill. I feel some difficulty in believing that the plaintiff did not become aware that fines were imposed for bad work in the defendants' mill before he had been in their employment very long, but in the view that I take of this matter, the date at which the plaintiff first became aware of the practice is not of importance. I should state that in the Uniform List of Prices there are certain rules for the settlement of trade disputes, and by rule 2 provision is made whereby the amount payable to a weaver for weaving may be increased in the event of the material supplied to him by his employer being bad material, causing thereby additional work to the weaver. Somewhat elaborate provisions are made for the settlement of the question whether the material is in fact bad, and whether there should be any and, if so, what allowance made in respect thereof, but it is unnecessary for me to go into this in detail. It will suffice if in this connection I say there is nothing in the rules or in the Uniform List of Prices whereby provision of any kind is made for deduction from the amounts payable to the weaver in respect of bad work done by him.

Now a weaver's duty is to weave as and when he is directed by his employer. He himself has nothing to do with the preparation of the loom for work, or with the keeping of the loom itself in order. The employer provides him with a loom, or looms, in a proper condition to weave the cloth required and the requisite yarn, and the weaver's duty is to put the shuttle in the loom and set it moving. He has to see that the loom is in good order and running properly. If the loom is not in good order it is his duty to call attention to it. Further he has to see that the shuttle is kept filled, that the warps are in order and none of the threads broken. If a thread breaks it is the weaver's duty to piece it up, because a broken thread not pieced up will produce in the cloth a fault or flaw, and, if the broken thread is permitted to continue unpieced for any time, a considerable portion of cloth may be thus spoiled and rendered unmerchantable. It follows therefore that one of the weaver's most important duties is to watch his looms carefully in order to see at once whether threads are broken and, if so, to piece them up.

The weaver is paid for each piece of cloth he weaves at the rate fixed by the Uniform List of Prices, and in most cases the sums earned are paid weekly. I am satisfied on the evidence before me that the weaver is not in the position of an independent contractor in respect of the pieces of cloth which he weaves. The relation between him and his employers is that of master and servant, and the payments which he receives are wages. In the defendants' mill the wages are paid weekly and the plaintiff was, in my judgment, in the defendants' employment at a weekly wage made up and calculated in the way I have stated.

Now the practice in the defendants' mill is for a weaver, when he has completed a piece of cloth which he is weaving, to take it to another part of the building and leave it there. That cloth is then examined and measured by a person in the employment of the defendants, known as a clothlooker. If the cloth is satisfactory, it is passed by the clothlooker into the warehouse. If, however, the cloth has such serious faults in it that the clothlooker thinks it not merchantable cloth as a whole, he calls the manager's attention to it, and the manager, having examined it, determines whether it is a case in which the weaver should be cautioned against carelessness, or whether a more drastic step should be taken by directing that a sum be deducted from his wages for bad work.

In order to comply with s. 116 of the Factory and Workshop Act, 1901, the defendants posted up in the factory, a notice which is Exhibit T. S. 3, and which states that the weaver's wages at this mill are paid on the basis and conditions of the Uniform List of Prices to which I have already referred, with such additions and alterations as may be agreed upon from time to time between the two Associations. Further, in order to comply with that Act, the plaintiff is given a card known as a tally card, which shows the particulars of the cloth he has to weave and the price payable for it, and, when he has completed the piece of cloth, the tally card is stamped with the appropriate date and it is therefore possible for the weaver at the end of the week to ascertain precisely from the tally card before him the amount of his earnings for the week.

In the course of the plaintiff's employment with the defendants he has from time to time produced cloth with faults due to his carelessness and he has been, from time to time, what he described as chastised for those faults. By that I understand him to mean that he has been reprimanded by the manager, but until the event, in July, 1928, which has given rise to this action the plaintiff had never been fined for bad work.

In the week beginning July 25, 1928, the plaintiff was directed by the defendants to weave (inter alia) a length of cloth 80 yards long. The cloth was what is known as sateen, and is not cloth very difficult to weave. The price payable to the plaintiff for the 80 yards was 7*s.* 4*d.* When the plaintiff had woven the 80 yards it came under the notice of the clothlooker, Mr. Daley. The cloth had a serious fault. For a distance of 3 yards there was a very noticeable mark, which was the result of the plaintiff having allowed a broken thread to go unpieced, and the fault was so serious that the 3 yards in question was not merchantable cloth at all. This was noticed by Mr. Daley, who told the plaintiff that he would have to report it to the manager, Mr. Ridehalgh, and it was duly reported to him. Mr. Ridehalgh having seen the cloth, decided that the plaintiff should be fined 1*s.*, and this was communicated to him. For the week ending August 1, 1928, the plaintiff had earned the sum of 2*l.* 6*s.* 6½*d.* for the above 80 yards and other work. From that there had to be deducted certain sums for Health Insurance and other matters which are admittedly proper deductions, leaving a sum of 2*l.* 5*s.* 0½*d.* payable to him, but the actual amount paid to him was 2*l.* 4*s.* 0½*d.*, 1*s.* being retained by the defendants as a deduction or fine in respect of the above bad work.

Now I am satisfied, and I find as a fact, that the 3 yards of cloth in question was not merchantable cloth; that this was due to the plaintiff's carelessness; and that the loss that the defendants suffered owing to that fault exceeded the sum of 1*s.*

The plaintiff claims that the defendants' deduction of this 1*s.* was unjustified in law and that he is entitled to recover it. The defendants deny this claim, and they put their case in four different ways.

First they say that apart from any question of usage the wages payable to the plaintiff, as regulated by the Uniform List of Prices, refer only to payment for merchantable cloth, and that as the cloth, to the extent of 3 yards, woven by him, was not merchantable cloth he cannot recover the sum of 1*s.* or any other sum.

Secondly, they say that on the authority of such cases as *Farnsworth* v. *Garrard* (1) and *Mondel* v. *Steel* (2) the defendants are entitled to deduct from the sum payable to the plaintiff the loss sustained by them by reason of his failure to exercise reasonable care and skill and, as the amount deducted is less than the total loss they have suffered, he has no cause of complaint.

Thirdly, they say that apart from usage altogether, the plaintiff must be taken to have agreed to be employed by the defendants on the same terms as the other operatives in the mill and that, as those other operatives were all subject

(1) 1 Camp. 38. (2) 8 M. & W. 858.

to the liability of having a deduction made from their wages for bad work, the plaintiff must be taken to have agreed to a similar term in his contract of service and that that prevents him now from setting up this claim.

Finally the defendants say that in any event there is a usage in the cotton weaving trade in Lancashire which the law will recognize which permits an employer to make a deduction from the money which the weaver would otherwise receive as wages of a sum for bad work so long as the sum deducted does not exceed the total loss suffered by the employer as the result of the weaver's carelessness.

I will consider each of these grounds of defence separately.

Now so far as the first ground of defence is concerned, the defendants rely on the evidence given on their behalf by many employers in the weaving trade, some of whom have themselves been working weavers in earlier days, who say that the prices payable for wages as fixed by the Uniform List of Prices is for merchantable cloth only, and it is said that, as to the extent of 3 yards the cloth produced by the plaintiff is not merchantable cloth, the prices fixed do not apply. Now it is quite true that in the evidence of many of the witnesses, such a statement is made, but I feel some difficulty in appreciating exactly what it means. If it means that the wages are only to be payable in respect of merchantable cloth, then it would appear that the deduction to be made in this case would be only in respect of the unmerchantable 3 yards, and that as the price for the 80 yards was 7*s*. 4*d*., a proportionate deduction in respect of that 7*s*. 4*d*. should be made, but that is not the case which the defendants make, or plead. Nor would it assist them if they did, because the proportion to be deducted for the 3 yards of bad cloth would be very much less than the 1*s*. which in fact they have deducted. If, on the other hand, it means that if any one length of cloth is not as a whole merchantable cloth the scale of payment is not to apply at all, then it would appear that the plaintiff would only be entitled to be paid on the footing of a quantum meruit, and this again is not the case which the defendants have made, nor is it in accordance with the facts, because it cannot be doubted that fines are not invariably imposed whenever cloth is unmerchantable, or that very frequently the full wages are paid for pieces of cloth which are to some extent unmerchantable. When therefore the witnesses say that the prices are only for merchantable cloth they do not I think mean more than this, and this is in my judgment the actual contract between the weaver and his employer, that the prices fixed are for the work done, but that the weaver on his part contracts to use reasonable care and skill (such a contract is of course implied by the law in every contract of service of this kind) and a failure by the weaver to exercise reasonable skill and care is a breach of contract which may entitle the employer to terminate the contract of service and possibly in some case when the contract of service is determined, to recover damages against him. The amount of the damage may of course be more or less than the amount of the wages, and if it is more than the total amount of the wages, then in that way the wages may not be payable at all; that is to say there may be a right of set-off against the amount to which the weaver is entitled as wages. But, in my judgment, it is not true to say that the Uniform List of Prices does not apply to work which the weaver does, although that work may result in cloth which is not merchantable cloth. I am satisfied on the evidence before me that, apart from any usage (with which I will deal shortly) so long as the weaver remains in the employment of his employer, he is entitled to be paid for his work at the rate agreed, whether the cloth is merchantable cloth or not, but subject to the employer's right to terminate the contract if the weaver fails to exercise reasonable care and skill.

If that be the true position, that really disposes of the first two grounds set up as a defence in this action. Apart from usage, the plaintiff, in my judgment, is right when he claims that on August 1, 1928, he was entitled to be paid the sum of 2*l.* 5*s.* 0½*d.* as being the sum which he had earned. Moreover in my judgment such cases as *Farnsworth* v. *Garrard* (1) and *Mondel* v. *Steel* (2) have no application to

(1) 1 Camp. 38.

(2) 8 M. & W. 858.

a case where the relation between the parties is that of master and servant, and in any case, even if the defendants are entitled to recover from the plaintiff anything in respect of the unmerchantable cloth, which in my view they are not, they are not entitled to make such a deduction themselves from the wages, because such a deduction would be illegal under the Truck Act, 1831.

I can dispose of the third ground very shortly. There does not appear to me to be any evidence which would justify me in coming to the conclusion that when the plaintiff entered the defendants' service there was any term in the contract between them which, apart from usage, would justify a deduction from the wages payable to him and, in my judgment, if such deduction is to be justified, it can only be justified on the ground of the alleged usage.

Paragraph 4 of the amended defence states the alleged usage as follows: "The plaintiff was employed by the defendants under a contract the terms of which were implied from the usages obtaining in the cotton weaving trade of Lancashire and which consisted inter alia of the following:—(*a*) That the plaintiff should weave a good merchantable cloth in accordance with the instructions from time to time supplied to him by the defendants and should perform his work without negligence and in a careful manner. (*b*) That the wages of the plaintiff for cloth woven as set out in (*a*) hereof should be calculated on the basis of the prices set out in the list referred to in para. 10 of the statement of claim. (*c*) That the prices set out in the said list should apply to and be payable only in respect of a good merchantable cloth. (*d*) That in the event of any cloth woven by the plaintiff in purported pursuance of his said contract not being good merchantable cloth through the fault of the plaintiff the wages of the plaintiff should be computed by subtracting from the prices set out in the said list such fair and reasonable sum or sums as the defendants should think fit in the circumstances not exceeding the loss sustained by them thereby. The defendants will further rely upon Rules 1, 2, 3, and 4 of The Cotton Spinners' and Manufacturers' Association and the Amalgamated Weavers' Association

Joint Rules for the settlement of Trade Disputes." I should say that when this matter came before me last Sittings I took the view that the usage as pleaded, or rather the language in which the usage was pleaded in the defence, was ambiguous and might be open to question. Therefore I directed that the action should stand over and I gave the defendants liberty to amend their pleadings so as to state precisely what the usage was on which they rely. The paragraph in the defence which I have read is in the amended defence.

The facts with regard to the alleged usage I find are these. There has been for many years a practice in the cotton weaving trade in Lancashire for the employers to make deductions from weavers' wages for bad work. The evidence called by the defendants puts that beyond doubt. As I have already said, some of the witnesses who are now employers in the weaving trade began life as weavers themselves. In one case the witness, who was an elderly man, said that he began to work in a mill at the age of ten, and had known of the practice ever since then, and there is I think no doubt that for very many years there has been such a practice in the trade. Secondly, I think it is clear that the existence of that practice is very widely known to persons connected with the trade. This I think is obvious from the various attempts that have been made from time to time by the operatives to get rid of the system. Bills have been presented to Parliament for that purpose. There have been various inquiries with regard to the system and, moreover, after the Truck Act, 1896, came into operation, which Act would have rendered fines of all sorts illegal, the weaving trade was expressly taken out of the effect of that Act.

It seems to me therefore to be beyond question that this practice has existed for many years and persons connected with the trade have for many years known of its existence and, until very recently, the legality of the practice has not been challenged. On the other hand the practice of making deductions for bad work does not obtain in all the mills in Lancashire. From the evidence before me it appears that in some 15 per cent. of the mills there is no such practice at all. In some cases the practice has merely been suspended for a time in order to see whether it is possible to get rid of it, but there are undoubtedly a considerable number of mills at the present time in Lancashire where there is no system of fining at all. Further, the system of fining which obtains in the defendants' mill, and which is most usually practised in the mills in Lancashire, is not practised in all the mills where there is fining. In some of the mills, when the weaver has produced unmerchantable cloth he is required to take the cloth and the price of that cloth is deducted from his wages. That is not the system which obtains in the defendants' mill, nor is it the system which obtains in most of the mills in Lancashire. The system in the defendants' mill and in most other mills is that when a weaver produces cloth which is unmerchantable owing to his own fault, either the manager or some other person in authority decides whether any steps shall be taken with regard to that piece of cloth and it lies with that person to decide whether the matter shall be let drop altogether or whether the weaver shall be cautioned to be more careful in future, or whether a fine shall be inflicted, and it is for that person, and that person alone, to fix the amount of that fine.

Further it is said that by the alleged usage the fine or deduction can never exceed the loss actually suffered by the employer, and I have little doubt but that the fine actually imposed in every case is less than the actual loss to the employer, but in truth and in fact the amount of the fine is in most cases (and I think in every case) fixed before it can be possible to ascertain precisely what the actual loss is, because the piece may be taken by the merchants and paid for at the full rate, or they may require a reduction of the price, or they may refuse to take that piece altogether, in which case it may be sold as a job lot and the price which can be obtained for it as a job lot cannot be known for certain beforehand, or it may be proved to be utterly worthless. But long before it is known for certain what is going to happen to the cloth and what price the cloth is going to fetch the amount of the fine has been fixed and deducted, and therefore it is difficult to see how the amount of the fine can really have any relation to the actual loss suffered by the employer, and in truth, as one of the witnesses for the defendants said in the witness box, a fine or deduction is really imposed as a penalty upon a weaver for his carelessness, and to impress upon him the necessity for taking better care in the future, and it is not in my judgment imposed (primarily at any rate) for the purpose of making good any loss suffered by the carelessness of the weaver. The practice, as it obtains in the defendants' mill, is the practice which is most usual in the mills in Lancashire.

Now can such a practice be a usage which the law will recognize? It may be said that a practice which has obtained for so long unchallenged must be a good usage, but although that is a consideration to which due weight must be given, it is not conclusive. The fact that a practice is long standing is not of itself proof of its legality; unconvicted old age is not necessarily incompatible with impropriety. Is this practice, although long established, a usage which the law will recognize? In my judgment it is not.

Many cases were cited to me on the question of usage in the course of the very able arguments addressed to me by the learned counsel on both sides, but it will be sufficient for my purpose to refer only to *Devonald* v. *Rosser & Sons.* (1) In that case one of the questions was whether an alleged custom by which the employers claimed to be entitled to shut down the works without notice whenever trade was bad was a custom which the law would recognize. The matter came before the Court of Appeal, and the Court of Appeal determined that such a custom was not a good custom. Lord Alverstone C.J. said (2): "With regard to the question of the alleged custom, I may say that I have always understood that a custom cannot be read into a written contract unless, to use the language of Lord Denman C.J. in *Reg.* v. *Stoke-upon-Trent* (3), it is 'so universal that no workman could be supposed to have entered into' the 'service without looking

(1) [1906] 2 K. B. 728. (2) [1906] 2 K. B. 741.
(3) (1843) 5 Q. B. 303.

to it as part of the contract.'" Now in the present case a weaver who is engaged to work for a particular employer does not necessarily know whether the mill in which he is to work is a mill in which the system of fining applies at all, and even if he knows that there is a system of fining he does not necessarily know what the system is. Therefore in my judgment the alleged usage in this case does not fulfil the condition which Lord Alverstone, quoting Lord Denman, lays down as being a necessary condition of a good usage. Further, Farwell L.J. put the matter on rather wider grounds. He said (1): "A custom to be good must be reasonable, certain and notorious. Jelf J. has found as a fact that it was not notorious, and I certainly do not disagree with that finding. Further, in my opinion it is neither reasonable nor certain, because it is precarious, depending on the will of the master. The alleged custom that the works may be closed without notice in the case of lack of orders at remunerative prices leaves it entirely at the discretion of the master to say what is remunerative and what is not. Such a custom, to my mind, cannot be good." Now in my judgment every word of that passage in Farwell L.J.'s judgment applies to this case. The alleged usage is neither reasonable nor certain, because it is precarious, depending on the will of the master. The alleged usage that a deduction may be made for bad work leaves it entirely at the discretion of the master to say whether the work is bad, whether the fault is the fault of the weaver and whether there shall be a fine or not, and what the amount of the fine shall be, and it appears to me that such a custom cannot be good.

The defendants contend that the matter does not depend entirely upon the will of the master because it is open to the weaver, if he objects to the fine, to take steps, either through his trade union or by proceedings in the county court, to get the matter set right. That does not appear to me to afford a good answer to the view which I take that the custom in this case is bad as not being sufficiently certain. A usage which leaves it at the will of the master to fix whether there shall be a deduction or not is, in my judgment, none the less objectionable because it may be not impossible in a Court of law for the operative to obtain a decision that the case was not a proper case for a fine at all. In truth and in practice the matter does depend on the will of the master, because in most cases where a small fine is imposed it is not practicable for an operative, however much he may think such a deduction unfair, to take proceedings to have the matter adjusted. It appears to me that for the reasons which led the Court of Appeal in *Devonald* v. *Rosser & Sons* (1) to come to the conclusion that the alleged usage was not one which the law would recognize must lead me to the conclusion that the usage in this case is not one which the law will recognize. The result of that is that in my judgment there is not imported into the contract between a weaver and his employer any term which justifies the employer making a deduction for bad work.

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(1) [1906] 2 K. B. 743.

I should add that in my judgment even if I had been able to come to the conclusion that the practice was not otherwise objectionable a deduction would be illegal under the Truck Act, 1831, unless the custom was that the deduction should be not a deduction from the wages, but a deduction made in calculating the amount of the wages. If there had been such a usage as that and the deduction had been made in accordance with that usage, other considerations would have arisen, but on the facts before me in this case I feel bound to come to the conclusion that the deduction made here was not a deduction of that kind at all but was in fact a deduction from the wages of the plaintiff. That I think appears quite clearly from the evidence and particularly from this. The tally card for the week ending August 1, 1928, with which the plaintiff was provided by the defendants in order to comply with s. 116 of the Factory and Workshop Act, 1901, contained a statement of the amount of the wages earned by the plaintiff, and from that tally card the plaintiff could tell at the end of the week what wages he had earned. In order to comply with the Factory Acts (and I must assume that the defendants did comply with them) that tally card must have shown the plaintiff accurately what his wages were, but the tally card contains no reference whatsoever to any deduction for bad work, and it appears to me therefore that in this case at any rate, when the plaintiff received 1*s.* less than the amount shown to be due to him by his tally card he was receiving 1*s.* less, because the 1*s.* had been deducted from his wages and not in arriving at the amount of his wages. Now if that be so in this case such a deduction in my judgment must be illegal under the Truck Act, 1831, on the authority of the decision of the House of Lords in *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (1)

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(1) [1906] 2 K. B. 728, 741, 743.

This deduction does not come within *Hart* v. *Riversdale Mill Co.* (2) That was a decision of the Court of Appeal with reference to an alleged custom, being in fact the custom in dispute in this case, and in that case the Court of Appeal held that the deduction was not illegal under the Truck Act. The case originally came before the magistrates and it went to the Court of Appeal upon a case stated by them. The case stated by the magistrates found that there was a custom to make deductions and that those deductions were made in calculating the amount of the wages. Upon those facts the Court of Appeal came to the conclusion that such a custom did not contravene the Truck Act.

Had I been able to come to the conclusion on the evidence before me that there was such a custom and that the deduction in this case had been a deduction made strictly in accordance with that custom, I should have been bound by and I should have gladly followed the decision of the Court of Appeal. But I have to determine this case upon the facts proved before me, and once I come to the conclusion to which I have come that the usage is not a usage which the law will recognize, then apart altogether from the Truck Act there can be no justification for a deduction of 1*s.* or any other sum for bad work, and consequently the decision in that case has no application to the case which I have to determine. Further that decision does not apply to the present case,

(1) [1906] A. C. 136.

(2) [1928] 1 K. B. 176.

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because, as I have said, I am satisfied that in this particular case the deduction was a deduction from wages, and not a deduction made in calculating the amount of wages.

It follows from what I have said that in my judgment there is no justification in law for the deduction which the defendants have made in this case from the plaintiff's wages unless it is under and by virtue of the alleged usage, and since in my judgment there is no such alleged usage which the law will recognize there can be no justification at all for the deduction.

In these circumstances the plaintiff is entitled to the declaration he asks. The defendants must pay him 1*s.* and the costs of the action.

Solicitors: *Stow, Preston & Lyttelton, for James C. Waddington, Burnley; Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester.*

G. R. A.

In re GARRETT.

FARWELL J.

[11 of 1929.]

1930
May 27, 28.

Bankruptcy—Police Pension—Vesting in Trustee precluded by Statute—Court's power to order Part Payment to Trustee for Creditors' Benefit—Jurisdiction—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 18, *sub-s.* 1; *s.* 51, *sub-s.* 2—*Police Pensions Act,* 1921 (11 *&* 12 *Geo.* 5, *c,* 31), *s.* 14, *sub-s.* 1.

The provision in the Police Pensions Act, 1921, s. 14, sub-s. 1, that on the pensioner's bankruptcy his pension "shall not pass to any trustee or other person" acting on the creditors' behalf merely excludes the pension from being property that vests in the trustee under s. 18, sub-s. 1, of the Bankruptcy Act, 1914.

It does not prevent the Court from making an order under s. 51, sub-s. 2, for payment of all or part of the pension to the trustee for the creditors' benefit.

This section applies to property whether or not vested in the trustee, and the order does not effect any vesting.

Ex parte Huggins (1882) 21 Ch. D. 85 and *In re Shine* [1892] 1 Q. B. 522 applied.

Special Case.

This was a special case stated by the Southend county court judge in pursuance of s. 100, sub-s. 3, of the Bankruptcy Act, 1914.

On May 7, 1929, a receiving order was made against Garrett on a creditor's petition filed April 17, and he was adjudicated bankrupt on May 15.

By an order of June 19 the bankrupt's estate was ordered to be administered in a summary manner pursuant to s. 129, whereupon the Official Receiver became the trustee.

The assets were 83*l.*, the unsecured liabilities 1275*l.*

The bankrupt, still undischarged, was a retired detective-inspector of the City of London police force with a pension of 281*l.* a year, which was subject to the Police Pensions Act, 1921. His wife was his only dependant. He retired in 1925.

On January 13, 1930, the Official Receiver filed an application under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, for an order setting aside for the creditors' benefit such portion of the bankrupt's pension as to the Court might seem just and for payment thereof to the Official Receiver.

On the hearing of the motion on February 7 the question arose whether having regard to the Police Pensions Act, 1921, and the Bankruptcy Act, 1914, the Court had power to make any order under s. 51, sub-s. 2.

The special case was stated accordingly and asked whether having regard to the Police Pensions Act, 1921, the Court had power under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, to order payment of the whole or part of a retired police officer's pension to his trustee in bankruptcy.

The Bankruptcy Act, 1914, provides as follows :—

Sect. 18, sub-s. 1, provides that upon adjudication the bankrupt's property "shall become divisible among his creditors and shall vest in a trustee" : see also s. 53.

Sect. 51, sub-s. 2, provides that where a bankrupt "is entitled to any . . . . pension" the Court, on the trustee's application, shall from time to time make such order as it thinks just for the payment of the pension or of any part thereof to the trustee to be applied by him in such manner as the Court may direct.

By s. 167 : "Property" includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere ; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

The Police Pensions Act, 1921, s. 14, provides that "The following provisions shall have effect with respect to every pension . . . . (in this section referred to as a grant) payable by the police authority" to the pensioner.

Sub-s. 1 provides that every assignment of and charge on a grant, and every agreement to assign or charge a grant, shall, except so far as made for the benefit of the pensioner's family, "be void," and on the pensioner's bankruptcy, "the grant shall not pass to any trustee or other person" acting on the creditors' behalf.

Roland Burrows for the Official Receiver. Apart from the Police Pensions Act, 1921, s. 14, sub-s. 1, this pension would have been property that vested in the trustee under s. 18, sub-s. 1, of the Bankruptcy Act, 1914, its application being regulated by s. 51, sub-s. 2: *Ex parte Huggins* (1), a decision on the corresponding sections of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 69), ss. 17, 90.

The Police Pensions Act, 1921, s. 14, sub-s. 1, stops this vesting, but it does not touch s. 51, sub-s. 2, as the non-vesting does not preclude the Court from making an order under s. 51, sub-s. 2: *In re Shine* (2), a case under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53, where the application was only refused on the ground of hardship.

In *In re Saunders* (3) the jurisdiction was recognized in the case of an inalienable Indian pension, but here again the order was refused on the ground of hardship.

The jurisdiction is also recognized in the case of a parliamentary salary: *Hollinshead* v. *Hazleton.* (4)

Again, a poor law officer's superannuation allowance is not "assignable or chargeable with his debts or other liabilities": Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), s. 10. But on December 16, 1904, with that provision before them the Court of Appeal made an order under s. 53 of the 1883 Act: *In re King.* (5) In that case no doubt there may have been vesting. The order in any case ceases on the bankrupt's discharge: *In re Gold.* (6)

Victor Ruston for the bankrupt. It is tolerably clear that the Police Pensions Act, 1921, s. 14, sub-s. 1, was intended to prevent police pensions from "passing to" the trustee in any way whatsoever and not merely to prevent vesting while allowing them to be wafted to him by a side wind under s. 51, sub-s. 2, of the Bankruptcy Act, 1914.

[FARWELL J. The registrar has called my attention to the similar provision in the Teachers (Superannuation) Act, 1925 (15 & 16 Geo. 5, c. 59), Sch. I., cl. 7, sub-cl. 2, with the addition, "but this provision shall be without prejudice to any order of the Court made under s. 51 of the Bankruptcy Act, 1914."]

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(1) 21 Ch. D. 85.
(2) [1892] 1 Q. B. 522.
(3) [1895] 2 Q. B. 117, 424.
(4) [1916] 1 A. C. 428.
(5) No. 1366 of 1903. Unreported.
(6) (1891) 8 Mor. 45.

That reproduces the School (Teachers) Superannuation Act, 1918 (8 & 9 Geo. 5, c. 55), s. 7, sub-s. 2, and as it shows that the Legislature clearly recognized the necessity of expressly preserving s. 51 in provisions of this nature, it is very much in my favour. Not being expressly preserved, s. 51 is impliedly repealed by the Police Pensions Act, 1921, s. 14, sub-s. 1.

This was the view taken in Chitty's Statutes as to the effect of the identical provision of the Police Act, 1890 (53 & 54 Vict. c. 45), s. 7, sub-s. 1, on the Bankruptcy Act, 1883: see Chitty's Statutes, 6th ed., vol. x., p. 83; see also Williams on Bankruptcy, 13th ed., pp. 252, 257; and Maxwell on Statutes, 7th ed., p. 137.

FARWELL J. [after stating the facts:] I have merely to determine the question of law. I am in no way concerned with the question how, if the Court has any discretion, it should be exercised in this particular case. That will be a matter for the county court judge, if he has any discretion.

The whole question turns upon two sections of the Bankruptcy Act, 1914, and one section of the Police Pensions Act, 1921. The latter Act makes certain provisions for payment of pensions to ex-police officers, to which I need not refer in detail. They are provisions as to amount, date of payment, allowances, gratuities, forfeiture and so on. Then s. 14, sub-s. 1, is in these terms. [His Lordship read the sub-section.] That is the relevant sub-section in the Police Pensions Act, 1921.

The relevant sub-sections in the Bankruptcy Act, 1914, are s. 18, sub-s. 1, read with s. 167, and s. 51, sub-s. 2. [His Lordship read s. 18, sub-s. 1, and the definition of "Property" in s. 167.] The definition is in the widest possible terms, and having regard to *Ex parte Huggins* (1) a pension granted to a police officer would, apart from the Police Pensions Act,

(1) 21 Ch. D. 85.

1921, s. 14, sub-s. 1, be property that on the police officer's bankruptcy would vest in his trustee

But the Police Pensions Act, 1921, s. 14, sub-s. 1, prevents that happening. It plainly excludes the pension from the property that passes to the pensioner's trustee in bankruptcy. The Legislature has thought fit to provide that a pension granted to a police officer is to remain for the benefit of himself and his family and that it is not to vest in any one else, not even his trustee in bankruptcy. It is plainly not included as property under the Bankruptcy Act, 1914, and does not pass to the trustee.

The effect is that when a police officer becomes bankrupt his pension is not affected. It does not vest in his trustee. It remains payable to and receivable by the pensioner. He continues (subject to what I will say in a moment) to be entitled to enjoy that pension without regard to the fact that he is a bankrupt, and that the rest of his property has vested in his trustee and is available for his creditors.

But when I come to s. 51, sub-s. 2, different considerations apply. [His Lordship read the sub-section.] That sub-section empowers the Court to direct that the whole or part of a bankrupt's pension, if it thinks just, shall be paid to the trustee for the benefit of the bankrupt's creditors. The sub-section applies both to property that vests in the trustee under s. 18, sub-s. 1, and also to property not so vesting.

This is shown quite clearly by *In re Shine* (1), a decision on the corresponding sections of the Bankruptcy Act, 1883.

Now is there anything in the Police Pensions Act, 1921, s. 14, sub-s. 1, which renders it impossible to give effect to s. 51, sub-s. 2, of the Bankruptcy Act, 1914? The answer is, No. There is nothing inconsistent in these two sub-sections. Sect. 14, sub-s. 1, prevents the pension vesting in the trustee, but there is nothing in its language to prevent the trustee from making an application under s. 51, sub-s. 2, or to prevent the Court, if it thinks just, from acceding to that application. An order under s. 51, sub-s. 2, does not have the effect of passing any part of the pension to the trustee in the sense of vesting it in him. The only result of the order is that the Court directs that such portion of the pension as the Court thinks just shall be applied in paying the bankrupt's debts. That is a power in the Court quite consistent with s. 14, sub-s. 1, of the Police Pensions Act, 1921, and there is nothing in that sub-section to exclude s. 51, sub-s. 2, of the Bankruptcy Act, 1914.

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(1) [1892] 1 Q. B. 522.

The result is perfectly reasonable. The undoubted intention of the Legislature in providing a pension for a police officer is that he shall have means of support for himself and his family, and shall not be deprived of that support on his bankruptcy. But that is not inconsistent with the Court having power in a proper case to say "the pension you receive is a greater amount than you require for the support of yourself and your family, and the excess shall and ought to be applied in payment of your just debts." Read together in this way there is nothing inconsistent between s. 14, sub-s. 1, of the Police Pensions Act, 1921, and s. 51, sub-s. 2, of the Bankruptcy Act, 1914.

I therefore answer the question in the affirmative and declare that the Court has power to make an order under s. 51, sub-s. 2, for the payment of the whole or part of a retired police officer's pension to his trustee in bankruptcy.

Official Receiver's costs out of the assets in hand. Leave to appeal.

Solicitors: *Solicitor, Board of Trade; Carter & Carter.*

G. R. A.

In re CAYLEY AND EVANS' CONTRACT.

[1929. C. 4387.]

BENNETT J.

1930
March 13, 14;
April 15.

Settled land—Compound settlement—Tenant for life—Vesting deed improperly framed—Agreement by tenant for life to sell—Incapacity—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-ss.* 1, 2; *ss.* 3, 4, 5, 13; *s.* 31, *sub-s.* 1; *s.* 72; *Second Schedule, para.* 1, *sub-paras.* 1, 2.

X. and Y., the trustees of an indenture of resettlement dated August 26, 1915, by which certain property was settled subject to a jointure, executed on May 1, 1926, a vesting deed reciting the resettlement and purporting to vest the property in the tenant for life.

On December 31, 1925, X. was the sole surviving trustee for the purposes of the Settled Land Acts of an indenture of settlement dated July 12, 1882, which together with the resettlement and two other documents formed the compound settlement of the property.

On July 5, 1926, the tenant for life entered into four contracts for the sale of a portion of the property to a purchaser. The purchaser raised objections to the title on the ground that the vesting deed was not framed in accordance with the provisions of the Settled Land Act, 1925: (1.) As it only dealt with the resettlement and not with the compound settlement; (2.) As it was not executed by the trustees of the compound settlement; and (3.) As it did not contain the names of the persons who were the trustees of the compound settlement. The tenant for life took out a summons for a declaration that a good title to the property had been shown:—

Held, that the vesting deed did not comply with the requirements of the Act of 1925 with reference to the compound settlement and that the tenant for life was not able to exercise his statutory powers as tenant for life in respect of the disposal of his property; and that the summons must be dismissed.

THE following statement of the facts is taken from his Lordship's considered judgment:—

On December 31, 1925, the Llannerch estates stood charged with a yearly rentcharge of 500*l.* by way of jointure in favour of Lady Mary Susan Cayley, who is still living. The rentcharge had been charged by an indenture dated September 16, 1884. By this deed one George Everard Cayley, in addition to charging the said Llannerch estate with the said yearly rentcharge, had appointed the said estate to trustees for a term of 200 years to commence from his death upon trust for securing the payment of the said jointure. The said jointure had been charged in exercise of a power in that behalf contained in an indenture of settlement dated July 12, 1882 (hereinafter referred to as the settlement of 1882). On December 31, 1925, subject to the said jointure, the said estate under and by virtue of a disentailing deed, dated February 5, 1915, and an indenture of resettlement (hereinafter referred to as the resettlement), dated August 26, 1915, the Llannerch estate stood limited to uses under which Sir Kenelm Cayley was tenant for life in possession thereof with divers remainders over. One Richard Baker Baker was the sole surviving trustee for the purposes of the Settled Land Acts, 1882 to 1890, of the settlement of 1882. The said Richard Baker Baker and John de Bathe Crossley were the trustees for the purposes of the Settled Land Acts, 1882 to 1890, of the resettlement.

On May 1, 1926, a vesting deed was entered into to which the said Richard Baker Baker and John de Bathe Crossley were parties of the one part and Sir Kenelm Cayley was party of the other part. The material parts of the vesting deed are as follows: it recites the indenture of settlement of August 26, 1915, and refers to it as the settlement, and recites that under that settlement Sir Kenelm Cayley was tenant for life in possession of amongst other hereditaments the Llannerch estate. It recites that Sir Kenelm Cayley had power under the settlement of appointing a new trustee or trustees of the settlement, and it recites that Richard Baker Baker and John de Bathe Crossley were trustees of the settlement for the purposes of the Settled Land Act, and that Sir Kenelm Cayley had requested those trustees to execute the vesting deed, and for giving effect to the requirements of the Settled Land Act, 1925. The deed witnessed that the trustees declared that the lands, hereditaments and premises mentioned in the first, second and third schedules, which included the Llannerch estate, which were then by any means subject to the limitations of the settlement were vested in Sir Kenelm Cayley in fee simple, subject so far as affected thereby to family charges specified in the fourth schedule. The family charges specified in the fourth schedule included the jointure payable to Lady Mary Susan Cayley. It also declared that Sir Kenelm Cayley should stand possessed of the premises upon the trusts and subject to the powers and provisions contained and subject to which under the settlement or otherwise the same ought to be held from time to time, and also that the trustees were the trustees of the settlement for the purposes of the Settled Land Act, 1925.

By a deed of appointment of new trustees, dated November 19, 1926, Henry John Cator was appointed to be a trustee of the resettlement jointly with John de Bathe Crossley in place of the said Richard Baker Baker, who retired from the trust for all the purposes for which the said Richard Baker Baker was appointed a trustee thereof.

On December 20, 1926, an order was made by Eve J. headed "In the Matter of the Cayley Settled Estates in the Counties of Denbigh and Flint settled by a compound settlement consisting of the following documents: (1.) a settlement dated July 12, 1882; (2.) an indenture dated September 16, 1884, being the deed whereby the jointure was appointed to Lady Mary Susan Cayley; (3.) a disentailing deed dated February 5, 1915; and (4.) the resettlement, and in the Matter of the Settled Land Act, 1925." By that order Eve J. appointed John de Bathe Crossley and Henry John Cator trustees of the compound settlement for the purposes of the Settled Land Act of 1925.

On July 5, 1926, Sir Kenelm Cayley entered into the four contracts in question with the purchaser, Mr. Evans. The purchaser, Mr. Evans, then delivered requisitions and objections on title. The first one is in these terms: "The purchaser contends that the vesting deed of May 1, 1926, is defective and invalid for the following reasons: (1.) The settlement affecting the property for the purposes of the Settled Land Act, 1925, was the compound settlement consisting of the settlement of 1882, the jointure deed of 1884, the disentailing deed of 1915 and the resettlement of 1915 (see proviso to s. 1, sub-s. 1, of the Settled Land Act, 1925), whereas the vesting deed only deals with the resettlement of 1915 and is not expressed to be and cannot operate as a vesting deed for the purposes of the compound settlement above referred to. (2.) The vesting deed should have been executed by the trustees of the compound settlement but was in fact executed by Messrs. Baker and Crossley as trustees of the resettlement of 1915. (3.) The vesting deed does not contain the names of the persons who were the trustees of the settlement (i.e., the compound settlement), as required by s. 5, sub-s. 1 (*c*), of the Settled Land Act, 1925, but merely a statement that Messrs. Baker and Crossley were the trustees of 'the said settlement' (i.e., the resettlement of 1915) for the purposes of the Act. It is accordingly submitted that a proper vesting deed must be executed by the trustees of the compound settlement above referred to before the vendor can effectively convey the property to the purchaser in exercise of the Settled Land Act powers." The reply to that was: "This contention is not admitted. (1.) At the date of the vesting deed Mr. Baker was the sole surviving trustee of the settlement of 1882 and therefore of the compound settlement affecting this estate. He was a party to the vesting deed which therefore contains all the statements and particulars required by s. 5 of the Settled Land Act, 1925. The fact that Mr. Baker is not described as a trustee of the compound settlement does not invalidate the deed (s. 5, sub-s. 3, ibid.), nor is it material for the same reason that the vesting deed is only expressed to operate on the settlement of 1915. Such a deed has no operation except as machinery and does not vest anything in anybody. It is merely executed in order to enable the tenant for life to execute his powers."

The vendor took out this summons for a declaration that the objections of the purchaser to the title of the vendor to the property comprised in the four contracts had been sufficiently answered and that a good title to the property had been shown.

Harman for the applicant vendor. The vesting deed, having been executed by the right person, although it was not intended to be a vesting deed under the settlement of 1882, is a proper vesting deed and is effectual to pass the land conveyed, free from all incumbrances. The only point in the case is whether another vesting deed is necessary. [He referred to the following sections of the Settled Land Act, 1925: s. 1, sub-s. 1, and the proviso to that sub-section; ss. 3, 5 and 13.] Having regard to s. 31, sub-s. 1, if there were no trustees of the earlier settlement for the purposes of the Settled Land Acts, then the trustees of the resettlement would be the trustees of the compound settlement until the trustees were appointed by the Court. *In re Price* (1) shows that one trustee is not a trustee at all for the purposes of these Acts. After the execution of a vesting deed the tenant for life can convey under s. 72 to the extent of the estate or interest given to him by the vesting deed.

D. Ll. Jenkins for the respondent purchaser. This vesting deed is bad, because it was not executed by the trustees of the compound settlement. Sect. 31, sub-s. 1, can only apply when there are no trustees of the earlier instrument, and is therefore inapplicable in the present case. There was a context in *In re Price* (1) which warranted the learned judge in arriving at his decision. From *In re Myhill* (2) it will be seen that where there is a trustee it cannot be said that there are no trustees within the section.

The two trustees of the resettlement were not the trustees of the compound settlement. The trustees of every settlement of land are the trustees of the compound settlement and not the trustees of any other settlement: see Settled Land Act, 1925, s. 1, sub-s. 1, and the proviso to that sub-section. See also para. 1, sub-para. 2, of the Second Schedule; and *In re Cradock's Settled Estates.* (3) It is essential that the title should be made by persons who can override all equitable interests.

Secondly, the vesting deed must be a document giving effect to the compound settlement, if there is one, and this vesting deed failed in that respect, because it is throughout framed and intended on the face of it to be a vesting deed for giving effect only to the resettlement. The disposition

(1) [1929] 2 Ch. 400.
(2) [1928] Ch. 103.
(3) [1926] Ch. 944.

cannot take effect until such a vesting deed has been executed: see s. 13. Sect. 4 shows that the trust instrument and the vesting deed are of equal importance. The present vesting deed does not comply with the requirements of s. 5.

Thirdly, if there can be a vesting deed for giving effect to a less comprehensive settlement, the tenant for life can only exercise his powers under the less comprehensive deed, and his conveyance to the respondent will not have the effect of overreaching the jointure term; and the fact that the trustees of the compound settlement were appointed long after the execution of the vesting deed is immaterial.

Harman in reply.

Cur. adv. vult.

April 15. BENNETT J. The question which arises for decision upon this originating summons is whether Sir Kenelm Cayley, the tenant for life of the Llannerch settled estate, having entered into four contracts for the sale to William Evans as purchaser of four plots of freehold land at Colwyn Bay, being part of the Llannerch estate, has caused the steps required by the Settled Land Act, 1925, to be taken to enable him to exercise his powers of sale as tenant for life, and to convey the four plots of land in question to the purchaser in accordance with his contracts.

The following are the facts and circumstances which give rise to the question. [His Lordship stated the facts as above set out and continued:] The purchaser's objections are based upon the provisions of s. 13 of the Settled Land Act, 1925, which (as amended) is in the following terms: "Where a tenant for life or statutory owner has become entitled to have a principal vesting deed or a vesting assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect of the settled land, any purported disposition thereof inter vivos by any person, other than a personal representative (not being a disposition which he has power to make in right of his equitable interests or powers under a trust instrument), shall not take effect except in favour of a purchaser of a legal estate without notice of such tenant for life or statutory owner having become so entitled as aforesaid, but, save as aforesaid, shall operate only as a contract for valuable consideration to carry out the transaction after the requisite vesting instrument has been executed or made, and a purchaser of a legal estate shall not be concerned with such disposition unless the contract is registered as a land charge. Nothing in this section affects the creation or transfer of a legal estate by virtue of an order of the court or the Minister or other competent authority."

It is not disputed that Sir Kenelm Cayley was a tenant for life who became entitled to have a principal vesting deed executed in his favour, and it is not disputed that the purchaser knew that he had become so entitled. The question is whether the vesting deed of May 1, 1926, to which I have referred, is a vesting instrument executed or made pursuant to the Settled Land Act, 1925, in respect of the settled land in question—namely, the Llannerch estate. Unless it is and until such a vesting instrument has been executed the provisions of the section impose a fetter upon the powers of Sir Kenelm Cayley to dispose of any part of the Llannerch estate, and the purchaser's objection is a good one.

The purchaser says that the vesting deed in terms has no reference to any settlement except the 1915 resettlement, and that, as the land was on December 31, 1925, the subject of a compound settlement, the requirements of s. 5 of the Settled Land Act, 1925, have not been complied with, and therefore no vesting instrument has been made or executed pursuant to the Settled Land Act, 1925, as is required by s. 13 of that Act.

In my judgment the purchaser's objection is a good one. It is a highly technical one, but none the less must, I think, prevail.

On January 1, 1926, by virtue of the provisions of s. 1 of the Law of Property Act, 1925, and of paras. 3 and 5 of Part II. of the First Schedule to that Act, the legal estate in fee simple absolute in the Llannerch estate vested in Sir Kenelm Cayley. On the same date Lady Mary Susan

Cayley's jointure was converted into an equitable interest by virtue of the provisions of Part I. of the same Schedule. The resettlement was, of course, a settlement subsisting at the commencement of the Settled Land Act, 1925. By virtue of the provisions of s. 3 of that Act the settlement of 1882 was also a subsisting settlement. By the combined effect of s. 1, sub-s. 1, of para. 1 of the Second Schedule to the Settled Land Act, 1925, and para. xxxi. of s. 117 of that Act, the settlement of 1882, the indenture of September 16, 1884, charging the jointure, the disentailing assurance of February 5, 1915, and the resettlement, together constituted a trust instrument whereby the trusts of the Llannerch estate were declared. The result in my judgment is that the Llannerch estate is the subject of a compound settlement, and was so on January 1, 1926, and by virtue of the proviso to sub-s. 1 of s. 1 of the Settled Land Act, 1925, references in that Act to the settlement are to be construed as meaning such compound settlement unless the context otherwise requires.

Turning now to the transitional provisions in para. 1 of the Second Schedule, as I have already stated, the four instruments to which I have referred together constituted the trust instrument by virtue of s. 1, sub-s. 1, of the said paragraph. It is then necessary to apply the terms of sub-s. 2 of s. 1 to the facts of the case, and, so applying them, in my judgment they require the execution of a principal vesting deed with reference to the land the subject of the compound settlement by the trustees of that settlement. This is, I think, one of the points decided by Astbury J. in *In re Cradock's Settled Estates.* (1) Now the vesting deed must conform to the provisions of s. 5 of the Settled Land Act, 1925, and should be framed for the purpose of giving effect to the relevant settlement. The relevant settlement in this case is in my judgment the compound settlement, consisting of the settlement of 1882, the indenture of September 16, 1884, the disentailing deed of February 5, 1915, and the resettlement. The vesting deed of May 1, 1926, is plainly and undoubtedly framed upon the footing that the only relevant settlement is the resettlement, and is executed by the trustees of that settlement in their capacity as such and without any reference to any other settlement.

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(1) [1926] Ch. 944.

In my judgment it is not possible to hold that the deed is a compliance with the requirements of the Act in reference to the compound settlement upon the trusts of which the Llannerch estate was held on and after January 1, 1926. It follows, therefore, that in my judgment Sir Kenelm Cayley is not able to exercise his statutory powers as tenant for life of disposing of the Llannerch estate or any part thereof, and that the summons must be dismissed.

Solicitors: *Gibson & Weldon, for Tasker Hart & Munby, Scarborough; Amphlett & Co., for Amphlett & Co., Colwyn Bay.*

J. L. D.

In re STRATTON.

STRATTON *v.* ATTORNEY-GENERAL.

[1929. S. 3530.]

BENNETT J.
1930
April 10, 29.

Charity—Bequests to the Vicar for the time being of the parish of M.—"Parochial institutions or purposes"—Validity.

A testatrix bequeathed part of the proceeds of sale of a house and a sum of 1000*l.* to the Vicar for the time being of the parish of M. "to be by him distributed at his discretion among such parochial institutions or purposes as he shall select":—

Held, that the words "parochial institutions or purposes" might include objects which were not charitable and that the gifts were invalid.

Houston v. *Burns* [1918] A. C. 337 referred to.

Dunne v. *Byrne* [1912] A. C. 407 and *In re Bain* [1930] 1 Ch. 224 applied.

A TESTATRIX by a codicil to her will gave part of the proceeds of sale of a house in trust for the Vicar for the time being of the parish of Mortlake "to be by him distributed at his discretion among such parochial institutions or purposes as he shall select." She also, by a second codicil, gave 1000*l.* to the Vicar for the time being of the parish of Mortlake for the same purposes. The testatrix died on February 23, 1929. Her executors took out an originating summons for the determination of the question whether these bequests were valid charitable gifts or whether they or either of them failed to any and what extent.

A. J. Belsham for the plaintiffs.

Gavin Simonds K.C. and *Daynes* for the Vicar of Mortlake. These gifts are good charitable gifts. This contention would have been beyond controversy until the recent case of *Houston* v. *Burns* (1)—a Scottish case, in which nearly all the authorities cited were Scottish cases, and in which decisions such as that in *In re Mann* (2) were not cited. The gift in the present case is a good charitable gift, because it is a gift to the Vicar for the time being for certain purposes which the Court will limit to religious purposes : see Tudor on Charities, 8th ed., pp. 34, 44, 45. The purposes indicated by the word " parochial " can be cut down to those purposes with which the Vicar is primarily associated : see *In re Garrard* (3) ; *In re Bain.* (4)

A gift to the Vicar for the time being for parochial purposes must, having regard to the fact that he is a Vicar, be a gift for ecclesiastical parochial purposes. When a parish is spoken of in connection with the Vicar, the ecclesiastical parish is referred to. The words should be construed: "for such purposes, being parochial, as he, being an ecclesiastical person, may think fit." Lawrence L.J. in *In re Bain* (5) discusses this point : see also *In re Van Wart* (6)—a case referred to in Halsbury's Laws of England, vol. xxviii., p. 27.

Stafford Crossman for the Attorney-General. In this case it is open to the Court to come to the conclusion, on the construction of the gifts, that the Vicar would not be justified in applying any part of the money for any purpose other than charitable. The money is given to the Vicar for the time being for purposes within the ecclesiastical parish of

(1) [1918] A. C. 337.
(2) [1903] 1 Ch. 232.
(3) [1907] 1 Ch. 382.
(4) [1930] 1 Ch. 224.
(5) [1930] 1 Ch. 224, 234.
(6) Times Newspaper, Feb. 17, 1911.

Mortlake. There are no duties which a clergyman is called on to perform in his parish which would not be charitable. Farwell L.J. refers to *In re Garrard* (1) in *In re Davidson.* (2) See also *In re Barclay.* (3)

Vaisey K.C. and *Mumford* for the residuary legatee. The exceedingly wide words "parochial institutions or purposes" cannot be restricted to the narrow meaning of ecclesiastical purposes. Parochial purposes are not equivalent to ecclesiastical purposes. If the testatrix had meant "church purposes" she could have said so.

[They referred to *Dunne* v. *Byrne* (4); *Houston* v. *Burns* (5); and *In re Gwyon.* (6)]

Basil Blagden for the next of kin.

BENNETT J. The question which arises for decision on this originating summons is whether the gift which the testatrix has made by the first codicil to her will is a valid gift or whether it fails. The gift is in these terms. [His Lordship read the terms of the gift and continued:] It is not possible since the decision in *Houston* v. *Burns* (5) to support the gift as a good charitable gift on the ground that it is a gift for public purposes in a particular parish. Some other ground has to be found on which the gift is to be supported. Also I think that it is common ground that, if the gift is in such terms that the Vicar of Mortlake may select as objects objects which are not charitable, the gift is bad.

The objects of the gift must be charitable objects and none other, and the question is whether, when the trust is for parochial institutions or parochial purposes, the objects are necessarily charitable objects. On behalf of the Vicar the case is put in this way. It is said that, upon the true construction, the gift to the Vicar of the parish of Mortlake for the time being is for parochial purposes which must be limited to ecclesiastical purposes because of the character of the trustee—namely, the Vicar for the time being of the parish of Mortlake. The argument is based very largely on the decision of Joyce J. in *In re Garrard.* (1) In that case the learned judge had to consider the validity of a bequest of 400*l.* to the Vicar and Churchwardens for the time being of Kington "to be applied by them in such manner as they shall in their sole discretion think fit." Joyce J. decided that that was a valid bequest. He says: "Having regard to the decision of Kindersley V.-C. in *Thornber* v. *Wilson* (2), and see *In re Delany* (3), it is clear that a legacy to the Vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes. The churchwardens are the officers of the parish in ecclesiastical matters, so that a mere gift or legacy to the Vicar and Churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purposes in the parish. It was suggested that the words in the latter part of the gift were inconsistent with its being a charitable gift, and that they implied that the Vicar and Churchwardens were to take beneficially. In my opinion there is no contradiction or inconsistency in the will whatever. The words 'to be applied by them in such manner as they shall in their sole discretion think fit,' to my mind merely direct that the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals, or rather that there is power given to them to do it, subject always, of course, to the jurisdiction of the Court."

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(1) [1907] 1 Ch. 382.
(2) [1909] 1 Ch. 567, 573.
(3) [1929] 2 Ch. 173.
(4) [1912] A. C. 407.
(5) [1918] A. C. 337.
(6) [1930] 1 Ch. 255.

On the basis of that authority Mr. Gavin Simonds for the Vicar of Mortlake asks that the parochial institutions or purposes among which the bounty of this testatrix is to be distributed may be held to be ecclesiastical institutions or ecclesiastical purposes within the parish.

It seems to me that so to limit the words "parochial institutions or purposes" would be to disregard the language used by Lord Macnaghten in *Dunne* v. *Byrne* (4) and would be contrary to the views expressed by Lord Hanworth M.R. and Lawrence L.J. in *In re Bain.* (5) The language of this gift seems to me to be quite plain, and, as Lord Macnaghten says in *Dunne* v. *Byrne* (1): "It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee." It does not seem to me that there is any difficulty in interpreting parochial institutions or parochial purposes. They might, admittedly, include objects which are not charitable, and what is sought to be done on behalf of the Vicar is to limit the meaning of parochial purposes to ecclesiastical purposes and institutions, because the trustee of the testatrix's bounty happens to be a Vicar.

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(1) [1907] 1 Ch. 382.

(2) (1855) 3 Drew. 245; (1858) 4 Drew. 350.

(3) [1902] 2 Ch. 642.

(4) [1912] A. C. 407, 410.

(5) [1930] 1 Ch. 224.

Looking at the judgment of Lord Hanworth M.R. in *In re Bain* (2), a case in which the gift was to the Vicar of St. Alban's Church, Holborn, "for such objects connected with the Church as he shall think fit," it seems to me that Lord Hanworth took the view that if the gift had been to the Vicar for parochial purposes it would have been invalid. I think that that is a necessary implication from the language used by Lord Hanworth, and I think that Lawrence L.J. holds the same view. If that be so a decision in favour of the Vicar in the present case would be contrary to the views held by Lord Hanworth M.R. and Lawrence L.J. in *In re Bain.* (2)

The consequence is that, in my judgment, the answer to the question is that the gift in the first codicil and the gift of 1000*l.* contained in the second codicil are invalid and fail.

Solicitors: *Charles Robinson & Son; Treasury Solicitor; Jaques & Co.*

(1) [1912] A. C. 407, 410. (2) [1930] 1 Ch. 224, 231, 234.

J. L. D.

C. A.

1930

May 6, 7, 8.

CHOWOOD, LIMITED *v.* LYALL (2.).

[1928. C. 1896.]

Applied. *Re* 139 HIGH STREET, DEPTFORD. [1951] 1 All E.R. 950.

Land Registration—Freehold Land—Rectification of Register—Land erroneously registered under repealed Acts—No Title in registered Proprietor—Claim for Rectification by rightful Owner—Land Transfer Act, 1875 (38 *&* 39 *Vict. c.* 87), *ss.* 7, 95—*Land Transfer Act,* 1897 (60 *&* 61 *Vict. c.* 65), *s.* 7—*Land Registration Act,* 1925 (15 *Geo.* 5, *c.* 21), *ss.* 1, 2, 82, *sub-s.* 1 (*a*) (*g*) (*h*); *sub-s.* 3 (*a*) (*c*); *s.* 144, *sub-ss.* 1 *and* 2; *s.* 147.

The purchasers of freehold land caused themselves to be registered as first proprietors with an absolute title under the Land Transfer Acts, 1875 and 1897, of the land purporting to be conveyed to them, which included two narrow strips of woodland of which, as the Court decided in this action, an adjoining owner was in possession, having acquired a good title by possession to the fee simple at the time of the registration. On appeal from an order of Luxmoore J. for rectification of the register:—

Held, by the Court of Appeal, that notwithstanding s. 147 of the Land Registration Act, 1925, the power to rectify the register conferred by s. 82, sub-s. 1, of that Act enabled the Court to order rectification of entries made in the register under the Land Transfer Acts, 1875 and 1897, and accordingly that the order for rectification of the register by excluding from the plaintiffs' registered title the land erroneously included in it had been properly made.

Decision of Luxmoore J. [1930] 1 Ch. 426 affirmed.

APPEAL from a decision of Luxmoore J. (1)

The plaintiffs were the purchasers at an auction sale from the executors of one Pantia Ralli of certain freehold land known as Downs Field or Downs View in the parishes of Walton-on-the-Hill and Ashtead in the county of Surrey, and were on April 22, 1925, registered as proprietors, with an absolute title under the Land Transfer Acts, 1875 and 1897. The land as registered and shown and edged with red on the plan filed in the Land Registry, No. P. 12,039, included within its eastern boundary (where it adjoined a sheepwalk), and within its north-eastern boundary a strip of woodland of varying width known as the Shaws, that part along the eastern boundary being called the Sheepwalk Shaw and that to the north the Northern Shaw.

The defendant, Mrs. V. M. Lyall, having entered upon the part of Shaws claimed by her to cut underwood, the plaintiffs commenced proceedings against her for trespass and claiming

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an injunction to restrain her, her agents, servants and workmen from so trespassing. The plaintiffs admitted that the defendant was the owner of the soil of the sheepwalk and of the land adjoining the north-eastern boundary of the plaintiffs' land, but claimed the whole of the Shaws.

The defendant contended that she and her predecessors in title by themselves, their lessees and tenants had continuously from a date before the year 1893 been in undisturbed possession of the eastern part of the Sheepwalk Shaw, lying between the plaintiffs' land and the sheepwalk, and she denied any right of the plaintiffs to the said eastern part of the Sheepwalk Shaw. She contended that the eastern part of the Sheepwalk Shaw was bounded on its western side by a shallow ditch, which could be traced as dividing the Sheepwalk Shaw for its entire length into two parts. The defendant also contended that she and her predecessors in title, the owners of the land lying to the north of the plaintiffs' land, called the Northern Field, and to the west of the sheepwalk, by themselves their lessees and tenants had from before 1893 been in continuous undisturbed possession of the northern part, and from 1911 in undisturbed possession of the whole of the Northern Shaw.

The defendant also alleged that in 1911, H. C. Lyall, the defendant's husband and predecessor in title, settled and agreed with Pantia Ralli, the then owner of the estate of which the plaintiffs' land then formed part, the boundaries between their respective estates; and that by this agreement the boundaries were so adjusted as to include in H. C. Lyall's land the whole of the Northern Shaw and the eastern part of the Sheepwalk Shaw claimed by the plaintiffs. Further that at the time this agreement was arrived at, Pantia Ralli had acknowledged the title of H. C. Lyall to the said eastern part of the Sheepwalk Shaw and the whole of the Northern Shaw, and admitted that H. C. Lyall was in possession thereof, and so far as he was not already in possession thereof, had delivered him possession thereof. The defendant relied therefore upon the Statutes of Limitation, but in view of the fact that the plaintiffs had been registered with an absolute title under the Land Transfer Acts, 1875 and 1897, as owners of the land in question counterclaimed (inter alia) for an order that pursuant to the Land Registration Act, 1925, s. 82, the register of the plaintiffs' title to the land might be rectified by excluding therefrom the said eastern part of the Sheepwalk Shaw and the Northern Shaw.

The plaintiffs denied the defendant's allegations or that she was entitled to rectification.

In the course of the proceedings evidence was given on behalf of the defendant by witnesses as to the ditch above referred to constituting a boundary between the plaintiffs' land and the defendant's, which evidence was accepted by the learned judge ; also evidence was given by the defendant's witnesses as to acts of ownership by her predecessors in title over the land in dispute, and as to the arrangement come to in 1911 above mentioned.

Luxmoore J. held on the evidence : (1.) that the Northern Shaw and the eastern side of the Sheepwalk Shaw were in the possession of Mr. Lyall or his predecessors in title in 1868 and had remained in their possession and the possession of the defendant down to the time when this dispute arose, but that, even if this were not so, Mr. Lyall and his successors had since 1911, when the arrangement was made between him and Mr. Ralli, remained in possession of the pieces of land so as to confer on them a possessory title under the Real Property Limitation Act, 1874, which was complete before the plaintiffs' registration ; and (2.) that the plaintiffs' registration as proprietors of the pieces of land was made without the defendant's assent and in derogation of her rights.

He (his Lordship) said that on these findings of facts the question arose whether the register could be rectified. There was no power to rectify the register in the Land Transfer Act, 1875, except in s. 95. That section was prefaced by the words : "Subject to any estates or rights acquired by registration in pursuance of this Act" ; and as by s. 7 registration with an absolute title, vested the estate in fee simple in the first proprietor against all the world, no rectification was possible under that section in the present case.

That Act was extended to some extent by the Land Transfer Act, 1897, but he (his Lordship) did not think that s. 7, sub-s. 2, of the latter Act extended the power to rectify conferred by the Act of 1875. Except so far as the Land Registration Act, 1925, otherwise provided, the Land Transfer Acts, 1875 and 1897, were replaced by the Act of 1925, and s. 82, sub-s. 1, of this Act gave a wide power of rectification. But s. 82, sub-s. 3, provided that the register should not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who was in possession, "(*a*) unless such proprietor is a party or privy or has caused or substantially contributed by his act, neglect or default to the fraud, mistake or omission in consequence of which such rectification is sought." The plaintiffs had by their own act in registering a conveyance, which in itself was inoperative to pass the pieces of land in dispute, caused the mistake, but in any case the exception in s. 82, sub-s. 3 (a.), applied to this case. It was argued, however, that by reason of s. 147 of the Act of 1925 the power of rectification conferred by s. 82 did not apply to a first registration of land under the earlier Acts. That section only provided against the repeal of those Acts affecting any interest in land or entry in the register made before the commencement of the Act of 1925; but the power of rectification in s. 82 in no way depended on the repeal of those Acts. He therefore made an order on the counterclaim for rectification and dismissed the action.

The plaintiffs appealed.

The Court of Appeal held on the evidence that Luxmoore J. was justified in his finding that the defendant had acquired a title by possession to the pieces of land in question and was in possession under that title when the plaintiffs' registration took place, she or her predecessors in title having been in possession at least from 1911, and perhaps from an earlier date.

This appeal is reported only on the question whether in these circumstances the Court has power to make an order for rectification of the register.

Topham K.C. and *N. C. Armitage* for the appellants. The effect of first registration as proprietor of freehold land with an absolute title was under s. 7 of the Land Transfer Act, 1875, to vest in the proprietor an estate in fee simple subject to certain prior rights not material for the present purpose, " but free from all other estates and interests whatsoever." A limited power of rectification by the Court was given in s. 95, but the power was only exercisable " subject to any estates or rights acquired by registration in pursuance of this Act." Therefore the power was very limited. It would apply when owing to fraud a transfer was rendered void by s. 98, but when a person had been registered with an absolute title pursuant to a valid transfer, the power did not apply. That was altered to some extent by the Land Transfer Act, 1897, which by s. 7, sub-s. 1, gave a right of indemnity in respect of any error, omission or entry not capable of rectification under the principal Act. Sub-s. 2 is in the form of a proviso, and provides that " where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry, would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity." It is contended that this sub-section does not confer any increased power of rectification, but is only intended to provide that where there is rectification pursuant to s. 95 of the principal Act, the person dispossessed is to be indemnified. It is true that the language of s. 7, sub-s. 2, is apt to give a power of rectification, but it would be a startling thing to hold that it had enlarged the power given by s. 95 of the earlier Act, seeing that it is in the form of a proviso to a section dealing only with the subject of indemnifying persons suffering loss. If s. 7, sub-s. 2, was intended to extend the right of rectification, one would expect to find a provision omitting the initial words of s. 95 of the earlier Act. This was done in the Land Registration Act, 1925, where a wide power of rectification was conferred by s. 82.

[ROMER L.J. In Brickdale & Sheldon's Land Transfer Acts, 2nd ed., p. 309, it is assumed that s. 7, sub-s. 2, makes further provision for rectification.]

It might apply to a case of a forged transfer: see *Attorney-General* v. *Odell.* (1) If mistake without fraud were to be treated as giving a ground for rectification, it would largely destroy the difference between a possessory and an absolute title. Sect. 8 of the Act of 1875 provides that registration of any person as first proprietor with a possessory title only is not to affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of his title. If by rectification the same effect can be obtained, registration with an absolute title becomes of small value. Assuming that s. 7, sub-s. 2, of the Act of 1897 has extended the right to rectification, it should be given a narrow meaning. It is suggested that at most it only applies when there has been a mistake of fact and the intention has not been carried out. Under s. 12 of the Act of 1897, as under s. 21 of the earlier Act, registration with an absolute title prevents a period of advance possession before the date of registration from being allowed to run against the registered proprietor for the purpose of establishing a title by possession, and that supports the view that the title acquired by possession by the defendant in this case before the plaintiffs' registration does not afford a ground for rectification. The plaintiffs' registration in these circumstances was not a mistake which gives the defendant a right to rectification. For the effect of registration with an absolute title see *In re Suarez* (*No.* 2). (2) It shows that the scheme of the Act of 1875 was to confer a title against all the world on a person registered with an absolute title. Rectification under the Acts of 1875 and 1897 must therefore be limited to cases where registration is obtained by fraud or mistake.

It remains to consider the position under the Land Registration Act, 1925. Sect. 82, sub-s. 1, undoubtedly confers a wide power of rectification, but "subject to the provisions of this section." Sub-s. 2 makes it clear that rectification under

(1) [1906] 2 Ch. 47.

(2) [1924] 2 Ch. 19.

this section may affect "estates, rights, charges, or interests acquired or protected by registration." But sub-s. 3 provides that the register is not to be rectified except for the purpose of giving effect to an overriding interest" (which does not apply here) "so as to affect the title of the proprietor who is in possession," except in certain cases. The first of these exceptions is when the proprietor "is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought." Luxmoore J. has held that the case is brought within that exception merely because the defendant applied for registration; this, it is submitted, is clearly wrong.

[Lawrence L.J. The learned judge has found that Mrs. Lyall was in possession; if that be right s. 82, sub-s. 3, can have no application, and it becomes unnecessary to consider these exceptions.]

That is so if the Court finds that Mrs. Lyall was in possession. But even so s. 82 does not apply here, and it is contended that s. 82, sub-s. 1 (*h*), only allows of rectification when there has been a mistake as the result of which the intention is not given effect to. But in any case the registration here was made under the Acts of 1875 and 1897, and s. 147 provides that nothing in the repeal of these Acts is to affect any "entry in the register made before the commencement of this Act, or any title or right acquired . . . . before the commencement of this Act." Luxmoore J. sought to get over this by saying that s. 147 only says that nothing in the repeal of these Acts is to affect a title under them and not that nothing in the Act of 1925 is to affect them. But it is submitted that the real intention of s. 147 was that the title should not be affected by the alterations effected by the new Act. It is submitted therefore that the defendant is not entitled to rectification.

Manning K.C. and *C. L. Fawell* for the respondent were not called upon.

Lord Hanworth M.R. This is an interesting case, and it may be of importance on the question of land registration.

The action was brought by Chowood, Ld., against Mrs. Lyall for an injunction to restrain her from cutting timber or underwood on or otherwise trespassing on the plaintiffs' land adjoining the west side of the sheepwalk leading northwards from Hurst Lane in the parish of Walton-on-the-Hill in the county of Surrey, and damages. The plaintiff company and the defendant are owners and occupiers of contiguous land in this parish of Walton-on-the-Hill, and the action is based on trespass said to have been committed by the defendant in cutting down certain timber and underwood on a disputed piece of land which lies between their two estates. The plaintiffs start their action by saying that they are registered as the proprietors with an absolute title of the land in question at the Land Registry and that this gives them a right to prevent the defendant from interfering with what is their property as shown upon the map which is attached to the land certificate. Luxmoore J. has held that the defendant is entitled to succeed, that the disputed strip of land is her property, that the acts which she committed were exercised by her as acts of ownership upon her own land, and that the plaintiffs' certificate and the map attached to it must be rectified by indicating upon it the true limits of the plaintiffs' land. [His Lordship then proceeded to consider the question of fact decided by Luxmoore J., and came to the conclusion on the evidence that the defendant had acquired a good title by possession to the pieces of land in question, when the registration took place, she and her predecessors in title having been in possession at least from 1911 and perhaps from an earlier date.] The defendant, therefore, asks that her counterclaim should be allowed. The plaintiffs claim to succeed upon, what I may call, their statutory title. A plaintiff in ejectment must succeed upon the strength of his own title. The defendant is entitled to plead that he is in possession and leave the plaintiff by proof of the strength of his title to oust him. All that the plaintiffs have proved prima facia here is that they have a good statutory title—that they registered as the first proprietors with an absolute title and therefore have vested in them an estate in fee simple

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in possession in the land. They have not proved that they went into possession by exercising acts of ownership on that side of the shaw that belongs to Mrs. Lyall. I do not think then that any point can be made on the question of the onus of proof. The plaintiffs brought their action for trespass, but we are told that it was treated as an action of ejectment; but, whether the action is treated as an action of trespass, in which proof of possession would be absolutely necessary, or as an action of ejectment in which a plaintiff has to succeed by the strength of his title, the plaintiffs have not discharged the onus upon them so as to throw the onus on to the defendant. They have left an issue to be decided between the parties as to which of them was in possession of this narrow strip. The defendant, on the other hand, has proved to the satisfaction of Luxmoore J. and to the satisfaction of this Court that she is in possession and that she has been in possession, and that for more than twelve years, that there was an actual delimitation of the land in 1911, and that from and after that time there has been no modification of the claim made at that time and acquiesced in by Mr. Ralli. It appears to us therefore that the defendant has proved that she was in possession as owner of this strip of the sheepwalk shaw and also of the Northern Shaw.

It is argued on behalf of the plaintiffs that there can be no rectification. The Act of 1875 gave an estate in fee simple to the person registered with an absolute title, and s. 95, which allowed rectification in certain circumstances, begins with the words: "Subject to any estates or rights acquired by registration in pursuance of this Act." It is plain that the possibility of rectification under this section must be extremely small as it is only to be effective "subject to any estates or rights acquired by registration in pursuance of this Act." Indeed, it would appear that as the statute of 1875 left the matter there was practically no effective power to order rectification. Then came the Act of 1897. Sect. 7, sub-s. 1, provided that where any error or omission had been made in the registry or where an entry in the register was made or procured by fraud or mistake, and the error, omission or entry was not capable of rectification, there should be a right to indemnity. But there was also a proviso in sub-s. 2 which said: "Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry, would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity." We need not pause to consider the exact effect of that section. I do not want in this case to say anything which might create a difficulty in the matter of registration, but, as we are considering the effect of that section, I should like in passing to say that I respectfully agree with the view of that section expressed by Vaughan Williams L.J. in *Attorney-General* v. *Odell* (1), where he says this: "This sub-section seems to extend the area of rectification, for it provides for rectification in cases where the effect would be to destroy estates or rights acquired by registration under this Act."

Between 1897 and the coming into force of the consolidating Act of 1925, the Law of Property Act, 1922, and the Law of Property (Amendment) Act, 1924, were passed; and they contained provisions which modified the Land Transfer Acts, 1875 and 1897. Thus when the Consolidation Act of 1925 came to be passed it had to consolidate not merely the two Acts of 1875 and 1897, but the amendments and variations which had been made by the two later Acts to which I have referred. It is quite true, as Mr. Armitage has said, that s. 5 of the Act of 1925 states the effect of the first registration with an absolute title in the same terms as the Act of 1875, but it deals in Part VII. with the rectification of the register and also with the right to an indemnity. Sect. 82, sub-s. 1, provides: "The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases"; and, as Luxmoore J. has pointed out, it is sub-clauses (*a*), (*g*) and (*h*) which may be of service in this case. Luxmoore J. has said

(1) [1906] 2 Ch. 47, 74.

that there is power under those clauses of that sub-section to order rectification of the register. How far that may affect the absolute title granted under s. 5 it is not for us to consider, and it is a matter which had far better be left over until that express point arises. What we have to consider is whether or not it is right in a case in which we find that the defendant is in possession after there has been a settlement by agreement of a disputed boundary, that there should be an amendment of this register so as to cause the actual delimitation on the maps more accurately to represent what was intended to pass and did pass under the conveyances under which the plaintiffs and the defendant deduce their title. It appears to us that under s. 82 there is power to make this rectification, and sub-s. 2 expressly provides that "the register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise."

Then it is said that sub-s. 3 has some application. The opening words of that sub-section are: "The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession." When once it has been determined that the person claiming rectification is in possession, that sub-section does not apply and does not limit the power of registration.

Having carefully examined the power of rectification now granted, we have come to the conclusion that this is a proper case for the exercise of that power, that Luxmoore J. was correct in allowing rectification in accordance with the counterclaim, and that the appeal therefore fails.

The appeal, therefore, must be dismissed with costs.

LAWRENCE L.J. I agree. The dispute in this action concerns two strips of land: the first is a shaw known as the Northern Shaw; the second is the eastern part of a shaw known as the Sheepwalk Shaw. There was a third strip on the south which the plaintiffs admitted to have been erroneously included in the plan filed in the Registry, and as to which they had agreed to rectification before action brought. As regards the first strip the appeal has not been seriously pressed, and I will say nothing more about it than that it was obviously included in the plan by mistake, and that the entry in the register must be rectified by omitting it from the plan.

As regards the second strip however the appeal has been vigorously urged. Having carefully considered the evidence adduced at the trial, I am clearly of opinion that Luxmoore J. was right in holding that at the date of the plaintiffs' registration this strip belonged to and was in the possession of Mrs. Lyall, and that the registration was in derogation of her rights.

On the question of rectification I will, for the purposes of my judgment, assume, without expressing any opinion upon the point, that the learned judge was right in holding that sub-s. 2 of s. 7 of the Act of 1897 did not extend the power to rectify conferred by s. 95 of the 1875 Act, so as to enable the Court to rectify the register in the circumstances of this case. Whether that be so or not, however, is in my opinion immaterial, for I agree with the learned judge that s. 82 of the Act of 1925 confers ample power to rectify a first registration made before that Act came into force. I am further of opinion that the prohibition against rectification contained in sub-s. 3 of s. 82 does not apply in the circumstances as the plaintiffs are not and never have been in possession of the strip in question. Consequently, the rectification claimed by the defendant is not a rectification which will affect the title of a proprietor who is in possession of the land, and it is unnecessary to consider whether the present case comes within any of the exceptions mentioned in that sub-section.

Two points were made by the appellants why rectification could not be obtained in the present case. The first was based on s. 147 of the 1925 Act. I agree with the learned judge that this section does not operate in the manner contended for. The saving cl. (*a*) of sub-s. 1 of the section was obviously enacted solely for the purpose of emphasizing what had been already enacted by the Interpretation Act, 1889—namely, that the repeal of an Act shall not affect any transaction effected under the repealed Act whilst it was in operation; but it in no way purported to, nor did it in fact, limit the power of rectification contained in s. 82 of the Act of 1925. Sect. 82 confers in general terms a power on the Court to rectify the register, and the register includes entries made in it both before and after the passing of the Act.

The other point was that the case has not been brought within s. 82, because the registration of the plaintiffs' title was not a mistake within the meaning of sub-s. 1 (*h*) of that section. I disagree with that contention. I see no reason to limit the word "mistake" in that section to any particular kind of mistake. The Court must determine in every case whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified. Here I think there has been an obvious mistake by the erroneous inclusion in the plan filed in the register of this and of the two other strips of land which did not belong to their vendors. The evidence is clear that the predecessors in title of the plaintiffs had in fact no title and did not claim to have any title to the strip in question, and obviously therefore never intended to convey it to the plaintiffs. I have no reason to doubt that the plaintiffs thought that they were purchasing the land delineated on the plan, but in getting their title registered in the Land Registry they were acting on the mistakes which had been made in that plan, and the entry made in the Registry in derogation of the right of the true owner who was in possession was an entry made by mistake within the meaning of the section. I further agree with the learned judge that in the circumstances of the present case the rectification might also be made under clauses (*a*) and (*g*) of sub-s. 1. Moreover I am not satisfied that the defendant's application for rectification would not come under cl. (*b*) as being made by a person who is aggrieved by an entry in the register. Mr. Armitage suggested that cl. (*b*) applies only to a mistake made by the officials in the Registry and not to a mistake made or induced by one or other of the parties. I prefer not to express any concluded opinion on this point, as it is unnecessary to decide it in the circumstances of the present case.

In my judgment, for the reasons stated, the appeal fails and should be dismissed with costs.

ROMER L.J. The questions both of law and of fact arising on this appeal have been so fully dealt with by the Master of the Rolls and by Lawrence L.J., and I agree so entirely with the conclusions to which they have come and the reasons they have given for their conclusions, that I do not think it is necessary to add anything.

Appeal dismissed.

Solicitors: *Corsellis & Berney; Routh, Stacey & Castle, for Thring, Sheldon & Ingram, Bath.*

H. C. G.

GUY-PELL *v.* FOSTER.

[1929. C. 287.]

C. A.
1930
April 30;
May 1, 8.

Principal and Surety—Guarantee—Breach of implied Term—Subsequent Action to enforce Guarantee—Breach going to Root of Contract—Repudiation.

The defendant was the chairman of the Standard Petroleum Exploration Company, Ld., which at the end of 1921 was seeking to issue 15,000*l.* First Lien Debentures to rank pari passu with a previous issue of first lien debentures of the same amount; and the defendant, having interested the plaintiff in the matter, sent him a letter of indemnity dated February 17, 1922, in these terms: "Regarding the issue of 15,000*l.* First Lien Debentures of the Standard Petroleum Exploration Company, Ld., at the price of 80*l.* per 100*l.* . . . . I understand you are subscribing for 3000*l.* of the same at a cost to you of 2400*l.* In consideration of your giving me one-fourth of any profit you may receive on such investment, I hereby indemnify you against any loss thereon. The expression 'any profit' only refers to the redemption price of 100*l.* per 80*l.*, which, when received, will show a profit of 20*l.* per bond and the bonus out of the proceeds of any royalties on oil sales from the company's properties during the currency of the debentures. . . . . The interest you will be entitled to receive from the company is excluded from the consideration of profits." The debentures were redeemable on July 1, 1925, but they were secured by two debenture trust deeds which gave power to extend the due date, and in April, 1925, steps were taken which resulted in its extension to July 1, 1930. In May and June, 1925, a correspondence took place between the plaintiff and the defendant in which the plaintiff announced his intention of selling the debentures, and the defendant protested against this, claiming that they must be kept till their due date. On July 16, 1925, the plaintiff put the debentures up for sale, and in the absence of other bidders sold them to his son for 25*l.* He then commenced proceedings to recover the amount of his loss, but the House of Lords decided that nothing was payable under the indemnity until the due date arrived. On July 18, 1928, the company went into liquidation and the plaintiff, having repurchased the debentures from his son, brought these proceedings to recover his loss:—

Held, by the Court of Appeal (affirming Clauson J.), that in selling the debentures the plaintiff had committed a breach of an implied term of the contract, and having failed to maintain the position essential to enable the defendant to receive the consideration for the indemnity, he had committed a breach of a term going to the root of the contract The defendant had elected by his pleadings in the previous action to treat the contract as at an end and the plaintiff could not therefore maintain the present action.

Appeal from Clauson J.

The defendant was the chairman of the Standard Petroleum Exploration Company, Ld., which in December, 1921, became desirous of issuing 15,000*l.* First Lien Debentures ranking pari passu with a prior issue of 15,000*l.* First Lien Debentures. The earlier issue had been secured by a trust deed dated November 19, 1915, and by a supplementary trust deed dated March 16, 1922, the new issue of debentures was also secured on the original trust deed as altered by the supplementary deed.

In February, 1922, the plaintiff invested the sum of 2400*l.* in the purchase of six First Lien Debentures of 500*l.* each. This investment was made at the suggestion of the defendant, who after some previous correspondence with the plaintiff on the subject, wrote to him on February 17, 1922, enclosing a memorandum and form of application and a letter agreeing to indemnify the plaintiff in respect of any application by him for the debentures in the following terms:—

"Regarding the issue of 15,000*l.* First Lien Debentures by the Standard Petroleum Exploration Company, Ld., at the price of 80*l.* per 100*l.*, referred to in the annexed memorandum dated December 19, 1921, which I have initialled for identification, I understand you are subscribing for 3000*l.* of the same at a cost to you of 2400*l.*

In consideration of your giving me one-fourth of any profit you may receive on such investment, I hereby indemnify you against any loss thereon.

The expression 'any profit' only refers to the redemption price of 100*l.* per 80*l.*, which, when received, will show a profit of 20*l.* per bond, and the bonus out of the proceeds of any royalties on oil sales from the company's properties during the currency of the debentures, as set out in the annexed memorandum.

The interest you will be entitled to receive from the company is excluded from the consideration of profits."

The memorandum there referred to stated that the debentures were to be issued at the price of 80*l.* per 100*l.*; that they were to bear interest at 8 per cent. per annum and be entitled during their currency by way of bonus to 20 per cent. of the proceeds of any royalties on oil sales from the company's properties; and that they were to be redeemable at par on July 1, 1925. The memorandum also gave the names of the trustees for the First Lien debenture holders.

On February 21, 1922, the plaintiff wrote to the defendant confirming his verbal acceptance of the indemnity and enclosing an application for the debentures and the cheque for 2400*l.* The debentures were duly allotted to the plaintiff. The plaintiff had also bought shares in the company under another letter of indemnity from the defendant, but no question arose on that in the present action.

On April 3, 1925, a resolution was passed at a meeting of First Lien debenture holders pursuant to a provision in the debenture trust deed postponing the date of maturity of the debentures to July 1, 1930. The plaintiff was abroad at the time and on his return protested against this and on May 7, 1925, he wrote to the defendant as follows: "I have determined to realise my holding in the Standard Petroleum Exploration Company, Ld., and enclose you a copy of a letter which I have received from my brokers, Messrs. Woollam & Co., dated the 4th inst., from which it appears that the shares and securities of the company are now valueless. Under these circumstances I must ask you for repayment" of (inter alia) the sum of 2400*l.* under the contract of indemnity.

The defendant replied that the brokers' statement that no market existed in the securities was merely a repetition of what existed when the plaintiff invested—"hence, presumably, my indemnity"; and he added that no circumstances had arisen which entitled the plaintiff to call for repayment.

On May 27, 1925, the plaintiff wrote to the defendant to say that as the defendant appeared to be unwilling to take over his holding in the company, he was putting it up for sale by auction and would hold the defendant responsible for any loss occasioned. The defendant replied on June 2, 1925, that in his view the plaintiff was not entitled to sell the securities, "as you thereby imperil the consideration for which I gave you the indemnity, viz.: the one-fourth of any profit you may receive on the redemption price of 100*l.* per bond, and one-fourth of any royalties received as bonus during the currency of the debentures."

Further correspondence passed between the parties to a similar effect and as the plaintiff persisted in saying that he would sell the securities, the defendant wrote to him on June 22, 1925, saying: "As to your renewed threat I am advised you have entirely misconceived your position, and are not entitled to act as you propose, and, whilst I do not intend to resort to litigation . . . . you will understand that I again enter my protest, and you will be acting at your own risk." The plaintiff persisted in his attitude and on July 16, 1925, the shares and securities were put up for sale, and in the absence of bidders they were sold to the plaintiff's son for 25*l.*

The defendant having refused to indemnify the plaintiff for the loss so occasioned, the plaintiff on July 23, 1925, brought an action against the defendant (1) claiming a declaration that he was entitled to be indemnified on account (inter alia) of the loss on the debentures, and damages for breach of contract. These proceedings went to the House of Lords

(1) *Guy-Pell* v. *Foster* [1925 G. 1888] unreported.

and the House decided (reversing the decision of the Court of Appeal and restoring that of Romer J.) that the loss referred to in the contract of indemnity of February 17, 1922, was to be ascertained on the maturity of the First Lien Debentures and not earlier; and that owing to the postponement of the due date to July 1, 1930, this date had not then arrived and the action therefore failed.

In those proceedings the defendant in para. 4 of his defence had pleaded as follows: "The defendant denies that there was here any breach on his part of the said contracts of indemnity or either of them. The defendant will contend that by reason of the sale of the said debentures by the plaintiff the defendant is discharged from all his obligations under the said contracts and each of them and that the plaintiff has no cause of action against the defendant."

Subsequently to the decision of the House of Lords the plaintiff repurchased the debentures from his son. Later, on July 18, 1928, an extraordinary resolution was passed at a general meeting of the company winding up the company on the ground that by reason of its liabilities it was unable to continue its business. Thereupon the principal money and interest secured by the debentures became immediately payable and the plaintiff having received nothing on account of his debentures commenced these proceedings on February 5, 1929, claiming a declaration that he was entitled to be indemnified by the defendant on account of his losses on the debentures and damages.

By his defence the defendant contended that by the sale of the debentures in 1925 the plaintiff had committed a breach of a condition or term of the contract of indemnity and that the defendant was accordingly under no liability in respect of it.

Clauson J. said he found difficulty in satisfying himself that on the fair construction of the letter of indemnity there was an implied agreement by the plaintiff to retain the debentures till maturity. But he thought that by parting with the debentures the plaintiff had put himself in the position of being unable to enforce the contract of indemnity.

Lord Warrington had said in the House of Lords in the previous action that it was a condition of the defendant's liability that the debentures should be retained by the plaintiff, because unless this was done, the defendant would not be entitled to receive his share of such profits as might be earned between the sale of the debentures and the expiration of the period of currency. He (his Lordship) agreed that it was a condition of the defendant's liability that the plaintiff should retain the debentures. Counsel for the plaintiff contended that the sale of the debentures was immaterial, because it was made to a person who knew all about the transaction and in equity could not have held the share of profits, if there had been any, against the defendant. That did not seem material. He therefore dismissed the action.

The defendant appealed.

R. A. Willes and *R. H. Hodge* for the appellant. The plaintiff is entitled to recover on the letter of indemnity for his loss. The matter in issue now was left undecided in the previous action, for the ratio decidendi of the House of Lords was that on the true construction of the letter of indemnity no loss could be recovered until the debentures had matured. When once a winding up resolution had been passed by the company the debentures became enforceable and the plaintiff became free to recover his losses. It is said, however, that he cannot recover owing to his sale of the debentures in 1925. Since then, however, he has repurchased the debentures, and as in the interval no bonuses were declared, the defendant has not been damnified by his action. The plaintiff is now in a position to hand over the debentures to the defendant on being indemnified in respect of his loss. The defendant has not been deprived of the consideration for the indemnity. The defendant was anxious to get the plaintiff to invest in the debentures—the chief consideration to him was getting the investment made. The rest of the consideration was that he should receive one-fourth of the profits, if any. All the expressed terms of the contract having been complied with, the Court should not imply some further condition which would deprive the plaintiff of all his rights under the document. The only condition should be that at the date when he comes to enforce the contract, he should be able, as he is, to comply with the terms of the letter of indemnity.

In any case an implied stipulation that the plaintiff should retain the debentures till they matured would not go to the root of the title. The fact that the plaintiff sought to recover prematurely and in a wrong way, does not now prevent him from coming forward with the debentures in his possession and making a proper claim : compare *Borrowman, Phillips & Co.* v. *Free & Hollis* (1); and *Consorzio Veneziano di Armamento e Navigazione* v. *Northumberland Shipbuilding Co., Ld.* (2); see also *Sparenborg* v. *Edinburgh Life Assurance Co.* (3) It must be admitted that the retention of the debentures till maturity was an implied term of the contract of indemnity, but its breach does not go to the root of the contract.

[LORD HANWORTH M.R. Is not this a case where the defendant is entitled to treat the contract of indemnity as broken by the plaintiff's action in selling the debentures, in accordance with the principle stated by Bowen L.J. in *Johnstone* v. *Milling*. (4)]

No, because the act of selling was not a breach going to the root of the contract. The breach must deprive the other party of the whole of his consideration in order that it should deprive the plaintiff of his remedy : Norton on Deeds, p. 535, and notes to *Pordage* v. *Cole*. (5) Further, the alleged act of repudiation here was done under a mistake of law, and when this is so the contract is not put an end to : *Mersey Steel and Iron Co., Ld.* v. *Naylor, Benzon & Co.* (6)

Sir Leslie Scott K.C. and *J. W. M. Holmes* for the respondent. It is now admitted that it was an implied term of the contract of indemnity that the plaintiff should retain the debentures until they matured. Whether the implied term was a condition as was suggested by Lord Warrington or a stipulation as was thought by Romer J., the breach of which would sound in damages, the defendant is entitled to judgment. It has really been conceded that this is so, if it was a condition. If on the true view it was an implied stipulation or undertaking, it was a term of such importance that its breach went to the root of the contract and entitled the defendant at once to repudiate the contract and treat it as at an end. This he clearly did by para. 4 of his defence in the previous action. Nothing that the plaintiff did subsequently could alter this and it was too late for him to seek to alter the position by repurchasing the debentures. The fact that he invested once more in debentures could not affect the position. By selling the debentures the plaintiff put it out of his power to be able to pay the defendant the consideration for the indemnity—namely, one-fourth of the profit on redemption of the debentures and of the bonuses from oil sales paid during the currency of the debentures. His breach had therefore deprived the defendant of the whole consideration and he was entitled to repudiate the contract.

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(1) (1878) 4 Q. B. D. 500.

(2) (1919) 88 L. J. (K. B.) 1194.

(3) [1912] 1 K. B. 195.

(4) (1886) 16 Q. B. D. 460, 472.

(5) (1670) 1 Wms. Saund. 548 (ed. 1871).

(6) (1884) 9 App. Cas. 434.

[They were stopped.]

R. A. Willes replied.

Cur. adv. vult.

LORD HANWORTH M.R. The question raised in this appeal is whether or not the plaintiff is entitled under a contract of indemnity which was contained in a letter written by the defendant to the plaintiff dated February 17, 1922, to be indemnified by the defendant on account of a loss which the plaintiff claims to have sustained by reason of subscribing for 3000*l.* First Lien Debentures in the Standard Petroleum Exploration Company, Ld. Clauson J. by a judgment dated January 24 of this year, decided that the plaintiff had not established his right to that indemnity, and from that judgment the plaintiff has appealed. [His Lordship then stated the facts preceding the previous action, and continued :] The action was tried before Romer J. (as he then was), who dismissed the action. On appeal the Court of Appeal took the view that the due date of the debentures as indicated by the documents between the parties was July 1, 1925, and remained so notwithstanding the postponement of the due date of the debentures to July 1, 1930. The Court of Appeal, therefore, held that the plaintiff, Mr. Guy-Pell, was entitled to have his indemnity implemented by the defendant, Sir Harry Foster.

From that an appeal was taken to the House of Lords. In the case which was presented to the House of Lords the point that was taken by Sir Harry Seymour Foster in para. 4 of his defence was made abundantly plain; because in the reasons which were put before the House of Lords by him, he said in the fourth reason that he was not liable because it was an implied term of the contract of indemnity that the respondent should retain the debentures until they were either redeemed by the company pursuant to the terms therein or until they were enforced against the company, and the respondent received his share of the proceeds of realization of the securities, and that by selling the debentures the respondent committed a breach of the contract and was not entitled to sue the appellant for breach of contract.

It is plain, therefore, that by his defence and in his appeal to the House of Lords Sir Harry Seymour Foster had relied upon the terms of the indemnity as showing that there were correlative rights between him and the plaintiff—correlative rights under which he was entitled to require the plaintiff to hold the debentures in order that he, Sir Harry, might have the security of obtaining from the plaintiff one-fourth of any profit arising during the currency of the debentures.

Looking back to the indemnity, I find the consideration stated in plain terms: "In consideration of your giving me one-fourth of any profit you may receive on such investment, I hereby indemnify you against any loss thereon." The defendant in the action may well have been unwilling to rely upon his possibility of receiving any profit from an assignee of the debentures even if he took with notice and could be compelled to hand over a portion; and the mere statement of that term of the guarantee would appear to show that both parties were relying the one upon the other—Mr. Guy-Pell relying upon the indemnity given by Sir Harry, and Sir Harry giving the indemnity and relying upon receiving from Mr. Guy-Pell any profit which he, Mr. Guy-Pell, might receive upon such investment. And the interpretation of the term "any profit" shows that the profit is to include any sums or bonus received during the currency of the debentures.

In the House of Lords Lord Cave L.C., in considering the terms of the indemnity in a judgment acquiesced in by Lord Dunedin and Lord Shaw, said: "My Lords, it is plain that . . . . the plaintiff's rights must depend on the construction placed on the two contracts of indemnity"—the second contract for this purpose is immaterial—"and in particular upon the question when, according to the true construction of those contracts, the 'loss' against which the plaintiff was to be indemnified ought to be ascertained." Then the Lord Chancellor goes on: "The contract stipulated for two things, namely (1.) a payment to be made by the plaintiff to the defendant of one-fourth of any profit which the plaintiff might receive on the investment, and (2.) an indemnity to be given by the defendant to the plaintiff against his loss thereon; and it is a natural inference that the parties intended that the profit and loss should be ascertained by reference to the same period."

Lord Warrington, in giving his judgment, said this: "On the construction of this letter I am of opinion that it was a condition of the appellant's liability that the debentures should be retained by the respondent during their currency inasmuch as, unless this was done, the appellant would not be entitled to receive his share of such special profits, if any, as might be earned between the sale of the debentures and the expiration of the period of currency." Then he proceeds to say this: ". . . . I prefer the view I have expressed to the view that there was in the contract an implied obligation on the part of the respondent to retain the debentures, if it is meant, as I think it is, that such an obligation was one the breach of which would render him liable to an action for damages."

The majority of the members of the House of Lords, therefore, gave judgment upon the view that the due date at which the loss was to be ascertained had not arrived. But it is noticeable that in the judgment acquiesced in by the other members of the House of Lords it is plainly stated by the Lord Chancellor that upon the construction of the indemnity it ought to be inferred that the parties intended that the profit and loss should be ascertained by reference to the same period. And the observation to which I have referred in the speech of Lord Warrington cannot be overlooked. He held, although it was unnecessary for his adhesion to the decision of the majority, that the term which I have read in the indemnity was an actual condition of any liability on the part of the defendant, a condition which imposed upon Mr. Guy-Pell the duty of holding and retaining the debentures during their currency in order that the defendant might have the right to receive from him, Mr. Guy-Pell, and from no one else, his share of such special profits as might be earned during the currency of the debentures.

After that decision had been given by the House of Lords, Mr. Guy-Pell, senior, bought back from Mr. Guy-Pell, junior, the debentures; he, therefore, put himself in the position of being once more the holder of the debentures; and at a later date—namely, on July 18, 1928, a resolution to wind up the company was duly passed, and on November 5 a claim was made by the plaintiff under the terms of the letter of indemnity, the plaintiff saying that, in consequence of the decision to wind up the debentures had now become due and that in accordance with the decision of the majority in the House of Lords he was, therefore, entitled to ask the defendant to respond to the terms of his indemnity. The plaintiff declined on the ground that the whole contract had been put an end to and a writ was issued in the present action on February 5, 1929. The defendant has set up the defence that the plaintiff was no longer entitled to the benefit of the indemnity as he had committed a breach of a term of the contract of indemnity—namely, to retain the debentures until they were redeemed or became payable; and that it therefore became open to the defendant to elect to treat the contract as at an end and that he had so elected, as appeared from his defence in the earlier action and his statement of his case to the House of Lords. The contract was therefore at an end and no further action upon it was open to the plaintiff.

Clauson J. has, in accordance with that reasoning, refused relief to the plaintiff, and the plaintiff now appeals to this Court. We, therefore, have to consider as a matter of law what is the proper interpretation to be put upon the indemnity and what is the effect of the previous proceedings between the parties.

It appears to us to be quite clear, more especially in view of the passages which I have read from the speeches in the House of Lords, that the indemnity did involve a correlative duty on the part of Mr. Guy-Pell to retain the debentures.

It appears, therefore, that the conduct of the plaintiff in refusing, in spite of Sir Harry Foster's protest, to hold the debentures and in proceeding with the sale was an act in respect of a matter vital to the contract. It does not appear that the guarantee would have been given unless the defendant had secured the correlative right from the plaintiff to receive one-fourth of the profits and to receive those profits from the plaintiff himself. On the question, therefore, whether this term was a fundamental term of the contract, it appears plain to us that it was, in accordance with the judgment of Lord Warrington, a condition of any liability being imposed upon the defendant that the plaintiff should continue to be the holder of the debentures.

What then is the effect of renunciation on a vital point by a party to a contract? In *Pordage* v. *Cole* (1) it is stated in the explicit terms appropriate to the older pleadings: "Where the mutual covenants go to the whole consideration on both sides they are mutual conditions and performance must be averred."

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(1) 1 Wms. Saund. 548 (ed. 1871).

I turn then to the two or three well known cases which establish that upon renunciation by one party of a contract, the promisee may elect whether to treat that as a determination of the contract and to proceed accordingly, or whether he will leave the matter open for the time. In *Hochster* v. *de la Tour* (1) Lord Hannen (then at the Bar) puts it in the course of his argument in this way (2): "If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted." In the course of the argument Crompton J. says (3): "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time.'"

I have dwelt upon the terms of the letters between the parties and the terms of the pleadings between the parties in order to make it quite plain that Mr. Guy-Pell in selling the debentures acted against the protest of Sir Harry Seymour Foster and that Sir Harry Seymour Foster elected to treat that conduct on the part of Mr. Guy-Pell as a breach of a term of the contract of indemnity which enured to the benefit of Sir Harry Seymour Foster and enabled him to treat the contract as repudiated.

In giving judgment in *Hochster* v. *de la Tour* (4) Lord Campbell said this: "But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any

(1) (1853) 2 E. & B. 678.
(2) Ibid. 683.
(3) (1853) 2 E. & B. 685.
(4) Ibid. 690.

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future performance of it, retaining his right to sue for any damage he has suffered from the breach of it." Then he proceeds: "It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind." In the present case, although Mr. Guy-Pell was cautioned, yet he elected to act as he did, and he cannot complain that Sir Harry Seymour Foster took him at his word and raised the point that the contract was at an end as between them.

In *Frost* v. *Knight* (1) Cockburn C.J. in his well known judgment makes the matter plain beyond words. (2) He says: "The promisee"—that in this case would be in regard to this particular term of the contract Sir Harry Seymour Foster—"has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him"—as in this case the sale of the debentures did deprive Sir Harry of his rights to one-fourth of the profits. Then he proceeds: "It is therefore quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract"—and in the circumstances of that case bring his action.

Then in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3) there is a short passage from the judgment of Lord Blackburn which I desire to read: "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* (1)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"

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(1) (1872) L. R. 7 Ex. 111.
(2) (1872) L. R. 7 Ex. 114.
(3) 9 App. Cas. 434, 443.

Finally in *Johnstone* v. *Milling* (2) Bowen L.J. says (3): "But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Upon looking to the reason of the thing it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of the contract, and yet to treat the contract as still open and existing with regard to the future."

The rule of law as stated in those cases is plain and applicable, at the present time, to this contract of indemnity. Mr. Guy-Pell refused to maintain the position which was essential for the purpose of Sir Harry Seymour Foster receiving the consideration for which he gave the indemnity; Mr. Guy-Pell claimed that he had a right to implement the indemnity when he did; Sir Harry Seymour Foster elected to treat that as a renunciation of a vital term of the contract, and maintained that position before the House of Lords. The matter has been determined upon the basis of a renouncement by the House of Lords, and the contract has, therefore, been brought to an end in omnibus, to use the phrase of Sir Alexander Cockburn. It cannot now be maintained by Mr. Guy-Pell

(1) 1 Wms. Saund. 548 (ed. 1871).

(2) 16 Q. B. D. 460.

(3) 16 Q. B. D. 473.

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that he is entitled, without the consent of Sir Harry, to put himself once more into the position of a holder of the debentures and treat what has happened as if it were of no moment at all so as to justify him in calling upon Sir Harry Seymour Foster to fulfil an indemnity the condition of which Mr. Guy-Pell had broken and broken upon a vital term.

For these reasons it appears to us that this action fails, that the judgment of Clauson J. was right, and the appeal must be dismissed with costs.

LAWRENCE L.J. Mr. Willes, in the course of his able argument, felt himself constrained to admit that it was an implied term of the contract of indemnity that the plaintiff should retain the debentures during the period of their currency.

When the former action was before the House of Lords Lord Warrington expressed the opinion that this implied term was a condition of the defendant's liability under the contract, but that it did not impose a positive obligation on the plaintiff the breach of which would render him liable to an action for damages. Mr. Willes admitted that if that be the right construction of the contract the plaintiff could not succeed on the present appeal. He, however, contended that on the true interpretation of the contract the term to be implied was a positive undertaking by the plaintiff not to part with the debentures during the period of their currency, but that this undertaking did not go to the root of the contract and that the breach of it did not prevent the plaintiff from recovering. There is much force in the contention that as the debentures never did yield any profit and, moreover, had been re-purchased before maturity and as therefore the plaintiff's breach had not in fact in any way prejudiced the defendant, the plaintiff ought not to be precluded from enforcing his rights under the contract. Whatever might have been the position if nothing had taken place before this action was brought beyond the mere sale and re-purchase of the debentures, I am of opinion that in face of the actual facts the contention thus advanced cannot be supported. In the events which have happened I am of opinion that it is unnecessary to decide whether the implied term was merely a condition of the defendant's liability or was a positive undertaking, as in either case the plaintiff cannot sustain his present claim.

Assuming in the plaintiff's favour that the implied term did impose a positive obligation on the plaintiff not to part with the debentures during the period of their currency, I agree with the opinion expressed by Romer J. in the former case that it was a fundamental term which went to the root of the contract. By selling the debentures during the period of their currency the plaintiff parted with the right to receive any profits which might thereafter arise therefrom, one-fourth of which he had agreed to hand over to the defendant as the consideration for the indemnity.

The defendant protested against the proposed sale on the ground that it was inconsistent with the contract and would imperil the consideration thereby agreed to be given to him: see letter of June 2, 1925.

Notwithstanding this protest the plaintiff stated that the sale must be proceeded with: see letter of June 6, 1925. He then sold the debentures and brought an action to enforce the indemnity. In the defence to that action the defendant pleaded (inter alia), that the sale of the debentures had discharged him from his obligations under the contract.

That action was fought up to the House of Lords and was finally decided in favour of the defendant. Romer J. held that at the date of the sale the debentures were still current; that the implied term that the plaintiff should retain the debentures during the period of their currency imposed a positive obligation on the plaintiff not to part with them during that period; that this obligation went to the root of the contract; and that as it had been broken the plaintiff could not recover under the contract. The Lord Chancellor (agreeing with Romer J. that the debentures were still current at the date of sale) held that as the plaintiff had agreed to pay to the defendant one-fourth of any profits which might be received by him from the debentures during the whole period of their currency, the time for ascertaining the plaintiff's loss was when the debentures ultimately matured for payment and as that time had not arrived the plaintiff's claim could not be sustained. Lords Dunedin, Shaw and Carson concurred in this judgment. Lord Warrington, whilst concurring in the opinion that the debentures were still current at the date of the sale, expressed the opinion (as I have already stated) that the implied term to retain the debentures was a condition of the defendant's liability under the contract and that as the plaintiff had parted with the debentures he could not sustain his claim for indemnity.

In these circumstances the question now arises whether, (assuming the true construction of the contract to be as stated by Romer J., and apparently acquiesced in by the majority of the members of the House of Lords, and not as expressed by Lord Warrington), the defendant was right in treating the implied undertaking not to part with the debentures during their currency as a stipulation going to the root of the contract the breach of which absolved him from any further liability thereunder.

Mr. Willes, whilst relying upon the re-purchase of the debentures as having placed the plaintiff in a position to hand them over to the defendant on the latter paying the loss on the original investment, frankly admitted that he could not contend that in the circumstances the re-purchase would enable the plaintiff to sustain his present action, if the Court were to hold that the sale amounted to a breach of a fundamental term of the contract.

In *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) Lord Blackburn states: " The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* (2)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, ' I am not going on to perform my part of it

(1) 9 App. Cas. 434, 443.
(2) 1 Wms. Saund. 548 (ed. 1871).

when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.' "

The question therefore resolves itself into whether the obligation undertaken by the defendant under the contract is dependent upon or independent of the implied obligation on the part of the plaintiff not to part with the debentures before maturity. If these two obligations are independent of each other the plaintiff is entitled to sustain an action for breach by the defendant of his obligation notwithstanding that the plaintiff may himself have committed a breach of the implied obligation on his part. If, on the other hand, the obligations undertaken by the parties are mutual and go to the whole consideration on both sides they are mutual conditions and the plaintiff having committed a breach of his obligation cannot maintain an action for a breach on the part of the defendant: *Boone* v. *Eyre*. (1)

In the present case I do not think it is reasonably open to doubt that the plaintiff's obligation to retain the debentures during the period of their currency formed the basis of the consideration for the defendant's obligation to indemnify the plaintiff against loss and went to the root of the bargain between the parties. Without such retention the plaintiff could not give to the defendant the one-fourth share of the profits which, according to the terms of the contract constituted the only consideration for his agreement to indemnify the plaintiff. It follows, therefore, that the performance by the plaintiff of his obligations to retain the debentures is a condition precedent to his right to enforce the performance of the defendant's obligation to indemnify. The failure on the part of the plaintiff to perform his obligation would, if the debentures should, after they had been parted with, yield a profit, render the performance of the contract by the plaintiff a thing different in substance from what the defendant had stipulated for. That this is the proper test to be applied when considering whether a particular stipulation goes to the root of the matter or whether it merely partially affects

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(1) (1777) 1 H. Bl. 273n.

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it and may be compensated for in damages is shown by the judgment of Baron Parke in *Graves* v. *Legg* (1); and by the judgment of the Court delivered by Blackburn J. in *Bettini* v. *Gye* (2); see also notes to *Pordage* v. *Cole*. (3)

The case may also be put somewhat differently. The sale of the debentures before maturity may be said to have amounted in effect to a declaration by the plaintiff of his intention no longer to carry out his express obligation to pay one-fourth of any profits which he might receive therefrom during the period of their currency. Such a declaration of intention, though not in itself and, unless acted upon by the defendant, a breach of that express obligation, gave the defendant a right of electing either to ignore the declaration and, holding to his contract, to wait until the time for its performance had arrived, or else to act upon the declaration and treat it as a final assertion by the plaintiff that he intended no longer to be bound by the contract, in which latter case the contract would cease to exist except for the purpose of the defendant enforcing any claim he might have for damages by reason of the wrongful repudiation: see judgment of Bowen L.J. in *Johnstone* v. *Milling*. (4) Looking at the facts from this point of view it is plain that the defendant unequivocally elected to treat the sale as a final assertion by the plaintiff that he intended no longer to be bound by the contract and that, therefore, the contract ceased to exist, with the result that the plaintiff cannot now sustain an action upon it.

In my judgment, for the reasons stated, this appeal fails and should be dismissed with costs.

ROMER L.J. When the earlier action between these parties was before me in October, 1926, I came to the conclusion, for the reasons that I then gave, that it was a necessarily implied term of the contract of indemnity entered into between the parties in February, 1922, that Mr. Guy-Pell should retain the debentures during their currency, and that, inasmuch as Mr. Guy-Pell had sold the debentures

(1) (1854) 9 Ex. 709, 716.
(2) (1876) 1 Q. B. D. 183, 186.
(3) 1 Wms. Saund. 319.
(4) 16 Q. B. D. 460, 473.

during their currency, he had committed a breach of the implied agreement on his part which went to the very root of the contract of indemnity, and thereby disentitled him to sue Sir Harry Foster in respect thereof. Neither further argument nor further reflection has caused me to alter or modify the opinion I then formed. This being so, it follows that, in my opinion, Mr. Guy-Pell is not entitled to maintain the present action. I only desire to add this. When the appeal in the first action came before the House of Lords, Lord Warrington expressed the opinion that the retention of the debentures by Mr. Guy-Pell during their currency was a mere condition of Sir Harry Foster's liability under the contract of indemnity, and said that he preferred that view to the view that I had taken that there was, in the contract, an implied obligation on the part of Mr. Guy-Pell to retain them. Clauson J. took the same view, but, with the greatest deference to Lord Warrington and the learned judge, it appears to me that merely to imply such a condition does not secure to Sir Harry Foster his full rights under the agreement. The consideration given by him for the one-quarter share of the profit mentioned in the letter of February 17, 1922, was not a payment by him under the contract of indemnity, but the incurring of a liability to indemnify Mr. Guy-Pell. If Mr. Guy-Pell had sold the debentures for 2400*l*. in the month of July, 1925, Sir Harry Foster would indeed have been relieved from his liability to make any payment under the contract of indemnity. But he would, if the view of Lord Warrington were to prevail, be deprived of the consideration that was to come to him for submitting himself to the liability to indemnify—a liability that he had remained subject to between the date of the contract and the date of the sale of the debentures.

Subject to these observations, I find myself in complete accordance with the views expressed by Clauson J. in his judgment in the present action, and I agree that this appeal should be dismissed with costs.

Solicitors: *Peacock & Goddard; Sparks, Russell, Isard & Co.*

H. C. G.

CLAUSON
J.
1930
April 30.

In re HAGGER.

FREEMAN *v.* ARSCOTT.

[1930. H. 593.]

Joint Will—Husband and Wife—Each given an Interest for Life with like Remainders over—Agreement not to revoke—Implied Trust on Death of first to die—Residuary Legatees take a vested Interest, subject to the life Interest of the Survivor.

A husband and wife made a joint will, whereby they left certain property, which each possessed at the time of the death of the spouse first dying, to the survivor for life with certain absolute remainders over, and they agreed that the will should not be revoked without their mutual consent. The wife died first, and as from her death the husband received the income from the whole estate until his death:—

Held, that from the death of the wife the property of which the husband was then possessed was subject to a trust under which the legatees in absolute remainder took vested interests subject to the life interest of the husband: and that the death of such a legatee after the ~~death of the wife~~ but before the death of the husband did not occasion a lapse.

The decision of Lord Camden in *Dufour* v. *Pereira* (1769) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304 applied.

ORIGINATING SUMMONS.

By a document (hereinafter called "the joint will"), dated September 19, 1902, and stated to be the last will and testament of them and each of them, John Hagger and Emma Hagger his wife, they appointed the defendant, C. A. G. Palmer, and the plaintiff to be the executors and trustees thereof, and after reciting that they had been engaged for many years past in a certain business to which they had devoted their joint energies, and as a result thereof had acquired certain lands, houses and other properties and moneys which they had always treated as their joint property, and no division thereof had ever been made, and that they had agreed to dispose of the same by their joint will, which they declared should not be altered or revoked save by their mutual agreement, they gave everything they possessed at the time of the death of such one of them as should first die to their trustees to pay their debts, funeral and testamentary expenses and certain legacies, and to pay the income of the whole of their estate to the survivor of them during his or her life, and (by clause 6) as to their freehold and leasehold properties at Wandsworth upon trust after the death of the survivor to sell the same, and, after payment of expenses, to pay and divide the net proceeds as follows, one-sixth to the plaintiff, one-sixth to Eleanor Palmer, one-sixth to Alice Young, one-sixth to Nellie Arscott, one-sixth to Edward Adams and Fanny Adams equally between them, and the remaining one-sixth in equal shares between Emma Louisa Adams, Jane Linsell and Frederick Jennings should they, E. L. Adams, J. Linsell and F. Jennings, be living at the death of the survivor of them, and (by clause 8) as to all the residue of their estate upon trust to pay and divide the same equally between Ellen Adams and Lydia Arscott.

Emma Hagger died on February 2, 1904, and the joint will was proved on February 15, 1904. After her death the deeds relating to the freehold and leasehold premises were, with the consent of John Hagger, deposited at the bank in the joint names of himself and the trustees of the joint will, and the net rents were paid to John Hagger during his life by the plaintiff.

Edward Adams died on July 15, 1905. Eleanor Palmer died on April 30, 1923, and Alice Young on October 29, 1926.

By his will dated December 3, 1921, John Hagger gave everything of which he was able to dispose to his executors upon trust to sell and convert the same into money, and out of the proceeds thereof to pay his debts and testamentary expenses, and to divide the residue equally between various persons, several of whom were not mentioned in the joint will.

John Hagger died on March 12, 1928, and his will and the joint will were proved on June 13, 1928. The will of John Hagger was referred to in the probate as a codicil to the joint will.

After the death of John Hagger questions having arisen as to the interpretation and effect of the joint will, and the proper method of distribution of the estate, the plaintiff took out this summons asking: 1. (*a*) Whether upon the true construction of the joint will and in the events which had happened, the whole of the moneys representing the proceeds of sale of the real and personal property ought to be treated as subject to the trusts of the joint will, and distributed accordingly? or (*b*) whether these moneys or any and what part thereof ought to be treated as part of the residuary estate of John Hagger? (2.) Whether upon the true construction of the joint will and in the events which have happened the several legacies and shares thereby bequeathed to beneficiaries who survived Emma Hagger but predeceased John Hagger were payable to the respective legal personal representatives of those beneficiaries or whether the legacies and shares or any and what part of them respectively, were payable to any and if so what person or persons?

G. P. Slade for the plaintiff.

Riviere for the legal personal representative of Eleanor Palmer. The will itself shows the evident intention of the husband and wife to pool their belongings as at the death of the one who dies first and to pass all their joint property under the joint will. They clearly intended their whole estate to be treated as a trust after the first death. It is a case of agreement, and the whole property is impressed with a trust as from the wife's death: *Dufour* v. *Pereira*. (1) The legatees, therefore, took under the trust created by the joint will, and not under the husband's will. In *Dufour* v. *Pereira* (1) one will was signed by both parties. In *Stone* v. *Hoskins* (2) and in *In re Oldham* (3), although there were agreements to make mutual wills, there were no agreements not to revoke them. In *Gray* v. *Perpetual Trustee Co.* (4) there was again no evidence of an agreement not to revoke the mutual wills. These cases, therefore, are not in point in the present case. In *In the Estate of Heys* (5), where there was evidence of an agreement not to revoke the mutual wills, it was held that the mutual wills created a tenancy in common.

(1) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

(2) [1905] P. 194.

(3) [1925] Ch. 75.

(4) [1928] A. C. 391.

(5) [1914] P. 192.

The husband in this case elected to take benefits under the joint will. He is therefore bound by its provisions, and the legatees take under it.

Garsia for the legal personal representative of Jane Adams.

Swords K.C. and *Belsham* for a surviving residuary legatee under the joint will. This was in effect two wills. It was not in the usual form of a joint will, which is to be found in *In the Goods of Piazzi-Smith.* (1) The result in this case was that there was a severance at the date of the death of the wife, and those legatees who were alive at her death take half their share under her will. The husband's property is not operated upon till his death. The wife agreed to leave her part of the property to her husband for life with remainder over, and vice versa. The husband has dealt with her part of the property accordingly. Therefore where a legatee died in his lifetime there has been a lapse as to his part of the property, as it only passed at his death. The foundation of Lord Camden's judgment in *Dufour* v. *Pereira* (2) is contract. In this case the husband has actually performed his part of the contract. He was a trustee to carry out his wife's part of the will, and he has done so.

Underhay for a residuary legatee under John Hagger's will. I adopt the argument that there were in effect two wills. The decision in *Dufour* v. *Pereira* (2) was not grounded finally on contract. A contract not to revoke a will is inoperative and in this case has in fact been so treated by the Probate Court, probate having been granted of the husband's later will. The decision in *Dufour* v. *Pereira* (2) was based on the wife having accepted the benefit of the husband's will; but in this case the property being joint, he was entitled by survivorship and has thus taken no benefit. The legatees under John Hagger's will take his share of the property.

CLAUSON J. [stated the facts and continued:] As a matter of construction it is clear that at the moment this

(1) [1898] P. 7.

(2) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

document came into operation its effect was to confer a life interest on the survivor of the husband and wife and a vested interest in remainder, as to one-sixth of the Wandsworth property, on Eleanor Palmer.

The wife died in 1904, and the joint will was proved as her will. The husband survived her, and during his lifetime Eleanor Palmer died. It has been argued that because of E. Palmer's death in the lifetime of the husband she took no interest in the Wandsworth property. It is admitted, however, that so far as that property could be shown to be the property of the wife, E. Palmer obtained a vested interest on the death of the wife, and there would be no lapse, but it was said that so far as the property could be shown to have belonged to the husband E. Palmer took no interest, because as regards his part of the property this document only became effective on his death, and that those administering it as the husband's will would have to look round to see who then took an interest in the property, and they would then find that E. Palmer's share had lapsed.

It is perfectly clear that when the husband and wife made this joint will they contemplated that the property which they were pooling would all go to the same beneficiaries, whether in its inception it was the property of the husband or the property of the wife, and that if I fail to give effect to this, in so far as E. Palmer's share is concerned, I shall be departing from the intention of the parties. I am satisfied that the law does not compel me to depart from that intention, and I reach that conclusion on reading the judgment of Lord Camden in *Dufour* v. *Pereira* (1), where he says (2): "The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him."

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(1) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

(2) 2 Hargr. Jurid. Arg. 310.

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To my mind *Dufour* v. *Pereira* (1) decides that where there is a joint will such as this, on the death of the first testator the position as regards that part of the property which belongs to the survivor is that the survivor will be treated in this Court as holding the property on trust to apply it so as to carry out the effect of the joint will. As I read Lord Camden's judgment in *Dufour* v. *Pereira* (1) that would be so, even though the survivor did not signify his election to give effect to the will by taking benefits under it. But in any case it is clear that Lord Camden (1) has decided that if the survivor takes a benefit conferred on him by the joint will he will be treated as a trustee in this Court, and he will not be allowed to do anything inconsistent with the provisions of the joint will. It is not necessary for me to consider the reasons on which Lord Camden based his judgment. The case must be accepted in this Court as binding. Therefore I am bound to hold that from the death of the wife the husband held the property, according to the tenor of the will, subject to the trusts thereby imposed upon it, at all events if he took advantage of the provisions of the will. In my view he did take advantage of those provisions.

The effect of the will was that the husband and wife agreed that the property should on the death of the first of them to die pass to trustees to hold on trusts inconsistent with the right of survivorship, and therefore the will effected a severance of the joint interest of the husband and wife. By the will they made a provision which was inconsistent with the survivor taking by survivorship. Therefore the property at the moment when, on the wife's death, it came within the ambit of the will ceased to be held by the two jointly, and the husband had no title to the wife's interest on her dying in his lifetime, save in so far as he took a life interest under the joint will. From the moment of the wife's death the Wandsworth property was held on trust for the husband for life with a vested interest in remainder as to one-sixth in E. Palmer. So far as the husband's interest in the property is concerned the will operated as a trust from the date of

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(1) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

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the wife's death. There is, accordingly, no lapse by reason of Eleanor Palmer's death in the husband's lifetime, but after the wife's death.

Solicitors: *Geo. Reader & Co.; Robert A. Kendrick; Arnold Carter, for Dunn & Baker, Okehampton.*

P. J. B.

MAUGHAM J.
1930
May 18.

LONG ACRE PRESS, LIMITED *v.* ODHAMS PRESS, LIMITED.

[1930. L. 279.]

Company—Issue of 8 per cent. Notes—Noteholders to share in Profits available for Dividend after payment of 8 per cent. on ordinary Shares—Meaning of "profits available for dividend."

A company issued notes which entitled the noteholders to a fixed amount per cent. and to an additional share in the "profits available for dividend."

Held, that the directors were entitled to apply the whole of the profits of any one year, after payment of the fixed amount per cent. to the noteholders, in reduction of the adverse balances of previous years, and the noteholders were not entitled to claim a share in such profits.

ORIGINATING SUMMONS.

The plaintiff company was incorporated in the year 1925, with the principal object of acquiring, printing and publishing a newspaper known as The People. The share capital of the company was 100,000*l.* divided into 100,000 shares of 1*l.* each. The company in the early years did not carry on business with success, and in 1927 and 1928 it created a series of 8 per cent. convertible notes to the aggregate amount of 150,000*l.*, of which 100,000*l.* were issued in 1927 and the remaining 50,000*l.* in 1928. These notes were in three different denominations, 100*l.*, 50*l.* and 20*l.*, but the clauses or conditions which were contained in the notes were in identical form. The company agreed to pay to the registered holders of the notes interest at the rate of 8 per cent. per annum by half-yearly payments, and it also agreed that until repayment of the principal moneys the registered holder of a note should be entitled to additional interest pursuant to the conditions indorsed on the note, and he was also entitled to exchange the note for preference shares. Condition 2 indorsed on the notes provided that: "Until payment of the principal moneys hereby agreed to be paid (*a*) Whenever the profits of the company available for dividend in respect of any year or other accounting period exceed the amount required to pay the fixed dividends on its pre-ordinary shares (if any) for the time being issued and a dividend at the rate of 8 per cent. per annum upon the capital for the time being paid up or credited as paid up on its ordinary shares the company shall by way of interest additional to the interest at the fixed rate above mentioned pay to the registered holders of the notes of this series for the time being outstanding rateably in proportion to the principal moneys outstanding in respect of the notes held by them respectively a sum equal to one half of the excess aforesaid less such proportion thereof as would have been payable to the noteholders who have converted their notes into preference shares as hereinafter provided if no such conversion had taken place Provided always that no holder of any of the said notes shall in any event be entitled in any year or other accounting period to additional interest exceeding interest at the rate of 4 per cent. per annum on the principal moneys outstanding in respect of the notes held by him. A declaration by the directors of the company as to the amount of the profits at any time available for dividend shall be conclusive." Article 141 of the company's articles of association provided that, before recommending any dividend, the directors might set aside out of the profits of the company such sum or sums as they thought proper as a sinking fund for the redemption of any outstanding debentures of the company, and that they might also set aside out of such profits such sum or sums as they thought proper as a reserve fund or reserve funds, which should at their discretion be applicable for meeting contingencies, or for gradual liquidation of any debt or liability of the company.

At the beginning of the year 1928 there was a debit to profit and loss account of 49,072*l.* 15*s.*, which consisted of trading losses for the preceding years. For the year ending December 31, 1928, the company made a profit of 17,803*l.* 16*s.* 8*d.* after payment of interest on the debentures and the 8 per cent. convertible notes. The directors considered that it was in the best interests of the company to retain in the business the whole of the profit of 17,803*l.* 16*s.* 8*d.*, and accordingly they applied it in reduction of the debit balance of 49,072*l.* 15*s.* The holders of the convertible notes claimed 4901*l.* 18*s.* 4*d.*, being 50 per cent. of the 17,803*l.* 16*s.* 8*d.*, after deducting therefrom the sum of 8000*l.*, being the amount necessary to provide a dividend at the rate of 8 per cent. for the ordinary shareholders.

Under these circumstances the plaintiff company took out this summons asking: Whether upon the true construction of the notes and in the events which had happened it (*a*) was bound to apply the profits, remaining after meeting all charges and deducting a sum equal to a dividend at the rate of 8 per cent. per annum on its shares, in or towards additional interest on the notes in the manner mentioned in condition 2 (*a*); or (*b*) was at liberty to carry those net profits or any portion thereof as the directors should think fit to a reserve account, or retain the same in diminution of any loss standing to profit and loss account, or otherwise as the directors should think fit?

The defendant company was the largest shareholder in the plaintiff company, and the defendant Gordon was a large holder of the notes.

W. F. Waite for the plaintiff company.

Gavin Simonds K.C. and *D. H. Cohen* for the defendant company. This is a business document that has to be construed. It is impossible to believe that the directors of the plaintiff company have no option but to distribute net profits up to the hilt when there is a large adverse balance to be dealt with. Condition 2 (*a*) provides that a declaration by the directors of the amount available for dividends shall be conclusive, and article 141 of the articles of association provides for the directors setting aside moneys for various purposes before recommending any dividend. The words "profits available for dividend" were construed in *Fisher* v. *Black and White Publishing Co.* (1) and *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (2) In *Fisher* v. *Black and White Publishing Co.* (1) it was held by the Court of Appeal that the directors were justified in setting aside as a reserve fund to meet contingencies so much of the surplus of the profits as they thought fit before dividing the profits available for dividend. This is a much stronger case, there being an adverse balance to be dealt with. The words were also construed by Eve J. in *Evling* v. *Israel and Oppenheimer, Ld.* (3) The directors were entitled to deal with the profits as they have done, and the noteholders are not justified in asking the Court to interfere with the discretion of the directors.

Lionel Cohen K.C. and *Cecil Turner* for the defendant Gordon. As a matter of business it is inconceivable that the noteholders would have advanced money to the company, at a time when it had an adverse balance of 40,000*l.*, on notes without security, if they did not bargain for all surplus profits. The directors could have dealt with the 8000*l.* available for dividends on the ordinary shares as they pleased; they were not bound to pay any ordinary dividend, but they must pay the noteholders their share of the profits. The directors were under no obligation to write off the debit balance before distributing profits: *Ammonia Soda Co.* v. *Chamberlain* (4) and *Stapley* v. *Read Brothers, Ld.* (5) The net profits of a company are the profits that remain after due provision has been made for renewals and repairs, and in this case the noteholders are entitled to their share of those profits, as provided by the notes.

MAUGHAM J. [His Lordship stated the facts and continued:] The question which is submitted to me, and the question of construction on the originating summons, is whether the sum of 17,803*l.* 16*s.* 8*d.* is to be treated as the

(1) [1901] 1 Ch. 174.
(2) [1902] 1 Ch. 146.
(3) [1918] 1 Ch. 101.
(4) [1918] 1 Ch. 266.
(5) (1924) 131 L. T. 629.

profits of the company "available for dividend" in respect of the year ending December 31, 1928. The materiality of it is this. The directors consider that it is in the best interest of the company to retain in the business the whole of that apparent profit of 17,803*l.*, and they have applied it in reduction of the debit balance of 49,072*l.* 15*s.*, so as to reduce that debit balance to the sum of 31,268*l.* 18*s.* 4*d.* Now, in considering the point, I have to bear in mind on the one hand the fact that the contract, including of course the condition which I have read, is a contract which is made between the company and a lender of money to the company, who is not prima facie concerned with the ultimate success of the company, and who, therefore, is not in the same position as a shareholder. On the other hand some weight is to be attached to the circumstance that condition 2 (*a*) begins with a reference to dividends without any such qualification as "whether the same shall be paid or not." Reading the whole sentence, omitting unnecessary portions, and omitting the reference to pre-ordinary shares which were never created, in substance the condition begins thus: "Whenever the profits of the company available for dividend exceed the amount required to pay 8 per cent. upon the 100,000 shares of 1*l.* each being the share capital of the company for the time being." That event having happened, the company then becomes bound by contract with the lender to pay by way of additional interest a sum to be ascertained as the condition requires; and the question which I have to determine here is, treating the preliminary words of the condition as being those I have mentioned, what is the true meaning of the words, "profits available for dividend"? I ask myself the question: When do the profits available for dividend exceed the amount required to pay 8 per cent. upon 100,000 ordinary shares? Do they so exceed that amount, that is the sum of 8000*l.* in a case where the directors consider it their bounden duty to make such a provision under article 141 of the articles of association as will reduce the sum available for dividend to something less than the sum of 8000*l.*? There are two alternatives, I think. One is that the words "profits available for dividend" refer to the sum that can be distributed without the directors being held liable as for an ultra vires act, and the other is that the words refer to the sum which can be properly distributed after the directors have performed on behalf of the company the duties which are imposed upon them by the articles of association. In my opinion that question is resolved by the decision of the Court of Appeal in *Fisher* v. *Black and White Publishing Co.* (1) It is true that the case there was simply the question of the true construction of the memorandum and articles of association, and was not complicated by the circumstance that there was a contract entered into between the company and the lender. Nevertheless the Court of Appeal did there put a construction upon the words which I have to construe here, "The profits . . . . available for dividend." There was a clause there that profits so "available for dividend" should be applicable in a specially defined way. There was also a provision in one of the clauses of Table A which was applicable, giving the directors power to set aside out of the profits of the company a reserve fund; and the Court of Appeal held that the words, "profits available for dividend," meant the net profits after making any deductions which the directors could properly make for reserve, and that they were entitled to set aside a sum as a reserve before paying a dividend to the ordinary shareholders, and none the less because of the mandatory form of the memorandum, which provided that the profits available for dividend should be applicable in a particular way. That case has been more than once followed in somewhat similar cases; in particular the same view was expressed by Sir Robert Romer L.J. in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (2) Assuming then in Mr. Cohen's favour that, as the result of the cases of *Ammonia Soda Co.* v. *Chamberlain* (3) and *Stapley* v. *Read Brothers, Ld.* (4), the directors would have been fully justified in paying a dividend

(1) [1901] 1 Ch. 174.
(2) [1902] 1 Ch. 146, 159.
(3) [1918] 1 Ch. 266.
(4) 131 L. T. 629.

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out of the profits for the year 1928, notwithstanding the fact that there was a large debit to the balance of the profit and loss account, I must nevertheless come to the conclusion that the words, "available for dividend," must be taken to mean available for dividend after making any reserve or other similar application which the directors, in good faith, acting on behalf of the company, think it is their duty to make in the interests of the company, and that the sum of 17,803*l.* 16*s.* 8*d.* was not a sum of the nature of "profits available for dividend" in that year. Accordingly the question asked by the summons must be answered in the negative.

Solicitors: *Bull & Bull; Last, Riches & Fitton.*

P. J. B.

LUXMOORE J.

1930

March 25; *April* 16.

In re BUSH.

B. LIPTON, LIMITED *v.* MACKINTOSH.

[1924. B. 3299.]

Administration—Insolvent Estate—Creditors—Loan—Rate of Interest—Bankruptcy Rules—Practice in Chancery Division—Judicature Act, 1875 (38 *&* 39 *Vict. c.* 77), *s.* 10—*Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 207—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 66, *sub-s.* 1 —*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 1; *Schedule I., Part I., rr.* 1, 2.

In the administration of the estates of deceased insolvents by the Chancery Division, s. 66, sub-s. 1, of the Bankruptcy Act, 1914, applies, and creditors are entitled to be paid interest only at a rate not exceeding 5 per cent. until all the debts proved in the estate have been paid in full.

The decision of the Court of Appeal in *In re Whitaker* [1901] 1 Ch. 9 followed.

PROCEDURE SUMMONS.

This was a procedure summons taken out by the direction of the Master to determine a question of principle, so that he might proceed to make his certificate. The action was a creditors' action for administration, the applicants being the plaintiffs. The plaintiff company's debt was in respect of a promissory note for 1600*l.* and interest thereon at the rate of one shilling in the £ per month, as provided by the promissory note. The order for administration was made on July 14, 1924. The estate was insolvent, and the question now raised by the summons was whether the plaintiff company's debt should be admitted for the amount of the promissory note together with the interest as therein provided, or as the judge might adjudge reasonable, and not 5 per cent. only, as provided by s. 66, sub-s. 1, of the Bankruptcy Act, 1914, until other creditors had received twenty shillings in the £.

J. W. F. Beaumont K.C. for the plaintiffs. In *In re Wells* (1) Romer J., following a decision of Maugham J. in *In re Agricultural Wholesale Society, Ld.* (2), held that s. 66, sub-s. 1, of the Bankruptcy Act, 1914, does not apply in a case like the present. That decision (1) altered the practice that has prevailed since the decision of the Court of Appeal in *In re Whitaker* (3) that in the case of insolvent estates the payment of interest must be governed by the rules of bankruptcy, and not those of the Chancery Division. Neither Romer J. nor Maugham J. seem to have had their attention called to *In re Whitaker* (3), but nevertheless this Court is bound by the decision of Romer J. in *In re Wells.* (1) *In re Whitaker* (3) cannot be said to be exactly in point in this case. The plaintiffs are entitled to the full amount of interest as provided by the promissory note, or to such interest as the Court shall adjudge reasonable.

[He also cited *In re Whitaker.* (4)]

W. N. Stable for the defendant. In *In re Leng* (5) it was held that the combined effect of s. 3 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and s. 10 of the Judicature Act, 1875, was to postpone the claim of a widow in respect of money lent to her husband to the claims of other creditors. That case is exactly in point here. The money-lender's position in regard to any interest over 5 per cent. is the same as that of a widow. None of the relevant cases were cited in *In re Agricultural Wholesale Society, Ld.* (1), or in *In re Wells.* (2) The decision in *In re Whitaker* (3) lays down a principle, and that was a decision of the Court of Appeal, and this Court is bound by it. Sect. 66, sub-s. 1, of the Bankruptcy Act, 1914, applies in this case, and the plaintiff company is only entitled to interest at the rate of 5 per cent.

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(1) [1929] 2 Ch. 269.
(2) [1929] 2 Ch. 261.
(3) [1901] 1 Ch. 9.
(4) [1904] 1 Ch. 299.
(5) [1895] 1 Ch. 652.

Cur. adv. vult.

April 16. LUXMOORE J. This is a procedure summons taken out by the direction of the Master to determine a question of principle so that he may proceed to make his certificate. The action is a creditor's action for administration, the applicant being the plaintiff. The order for administration was made as long ago as July 14, 1924. The estate is insolvent and the question that has arisen and falls to be determined is whether s. 66 of the Bankruptcy Act, 1914, ought to be applied or not. Sub-s. 1 of that section provides: "Where a debt has been proved, and the debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full." The question whether the section applies or not depends on the construction to be placed on s. 34 of the Administration of Estates Act, 1925. That section provides by sub-s. 1 that "Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act." Part I. of this First Schedule contains among other things rules as to payment of debts where the estate is insolvent.

Rule 1 provides that funeral, testamentary, and administration expenses are to have priority. Rule 2 provides that:

(1) [1929] 2 Ch. 261.

(2) [1929] 2 Ch. 269.

(3) [1901] 1 Ch. 9.

"Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

Sect. 34, to which I have just referred, and r. 2 are substantially in the same words as s. 10 of the Judicature Act, 1875, the only material difference being, so far as the administration of an insolvent estate is concerned, the addition in r. 2 of the words "and as to the priorities of debts and liabilities."

Sect. 10 of the Judicature Act, 1875, was construed by Cozens-Hardy J. in *In re Whitaker* (1), and his decision was affirmed by the Court of Appeal. (2) The question for determination in that case was whether voluntary creditors were to be paid in the administration by the Court of an insolvent estate pari passu with or after the creditors for value.

Before the passing of the Judicature Act, 1875, it was a well recognized rule of the Court of Chancery that in the administration of an insolvent estate by that Court creditors for valuable consideration took precedence over those whose debts were not founded upon a valuable consideration. It was argued in *In re Whitaker* (1) (2) that s. 10 of the Judicature Act, 1875, had not altered this rule, and that although in Bankruptcy a different rule prevails (i.e., that creditors, whether for valuable consideration or not, ranked pari passu) the Bankruptcy rule was not introduced into the administration of an insolvent estate.

The argument in effect was that the words "as to debts and liabilities provable" should be construed as meaning "the debts and liabilities which could be proved" and not as referring to the order in which such debts and liabilities were to be paid. Cozens-Hardy J., and the Court of Appeal in affirming him, declined to accept this argument, and

(1) [1900] 2 Ch. 676.

(2) [1901] 1 Ch. 9.

Rigby L.J. said (1): "Sect. 10 provides (among other things) that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words, I think they do not simply deal with the proof of debts. The same rules are to prevail 'as to debts and liabilities provable.' I cannot read those words as meaning simply 'as to the proof of debts and liabilities.' I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in Chancery. Now undoubtedly in bankruptcy (it does not matter how it came about) the rule as to debts and liabilities provable is that all those debts and liabilities, whether contracted for value or not, shall rank pari passu. I think we should be cutting down unduly the plain words of s. 10 if we were to allow the old rule of the Court of Chancery to override in the present case the existing rule in regard to bankruptcy. If ever that rule should be altered, it would of course be a different matter. I do not suggest that it ought to be altered; but it is now a fixed rule that voluntary debts shall be on an equality with debts for value. If this view conflicts with the decisions in *Smith* v. *Morgan* (2) and *In re Maggi* (3), I can only say that we are not bound by those decisions, and if and so far as it is necessary (which probably means altogether) we must overrule them."

Vaughan Williams L.J. said (1): "One thing is quite clear, namely, that the section does not mean that in all respects the results of a bankruptcy, and the consequent administration of the estate, and the results of the death of an insolvent and the consequent administration of his estate, are to be absolutely identical. It was long ago decided that, notwithstanding s. 10, you must still apply only in bankruptcy those bankruptcy rules, whether statutory or otherwise, which go to augment the bankrupt's assets as against

(1) [1901] 1 Ch. 12.
(2) (1880) 5 C. P. D. 337.
(3) (1882) 20 Ch. D. 545.

third persons. So far it is plain that there is intended to be a distinction between bankruptcy and the consequent administration and death followed by administration of the insolvent estate of the deceased. The section itself seems to me to point to an intention that the uniformity (if I may use the expression) shall be limited to some particular subjects, because it says 'the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively.' The section specifies four heads as to which uniformity is for the future to prevail. And, in my view, we have in construing it to determine what are the limits of the four heads specified, and then to see whether this rule of administration in Chancery, whereby voluntary creditors were postponed to creditors for value, is still to prevail.

"It seems to me that this rule of Chancery administration comes under the first of the four heads—namely, the rule in bankruptcy 'as to the respective rights of secured and unsecured creditors.' In my opinion, if those words are properly read, they do not mean, as Fry J. in *In re Maggi* (1) assumed that they do, only the respective rights of the two classes of creditors, secured and unsecured, as against each other, but that they include also the respective rights of those two classes inter se, and there can be no doubt that, as regards the rights of the creditors inter se, the rule in bankruptcy differed from the rule in Chancery."

Romer L.J. said (2): "The important words in s. 10 for the purposes of this appeal are, I think, those which provide that the bankruptcy rules 'as to the debts and liabilities provable' shall prevail in the administration of an insolvent estate by the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable are to prevail; it speaks of all rules 'as to debts and liabilities provable.' It appears to me that, if there be a rule in bankruptcy that a debt shall be provable, but only

(1) (1882) 20 Ch. D. 545. (2) [1901] 1 Ch. 14.

in an inferior position to ordinary debts, that would be a rule 'as to' that provable debt within the meaning of the section. And so if there be a rule in bankruptcy that certain debts shall be provable, but in a superior position. And equally, to my mind, if the rule in bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but pari passu with them, that would be a rule 'as to' those debts."

Sect. 34 and the rules under it add—as I have already pointed out—to the words of s. 10, the words "and as to the priorities of debts and liabilities." These words apparently add a fifth head to the four heads referred to by Vaughan Williams L.J. and to which there was to be uniformity between bankruptcy administration and administration by the Court of insolvent estates, if and so far as the words as to debts and liabilities do not by implication include the provision as to priorities.

The rule as to the rate of interest to be allowed in respect of a provable debt is one of the rules "as to" such a debt, and the provision that such rate of interest is to be limited to 5 per cent. until other debts proved have been paid in full is not only a rule "as to" the debts provable on the principle of construction laid down by the Court of Appeal, but also a rule "as to" the priorities of the debts proved and provable.

In my opinion the principle of the decision in *In re Whitaker* (1) governs the present case and I should have had no hesitation in so deciding were it not for the fact that there are two recent decisions which do not appear to be in accordance with that principle. I refer to the decisions of Maugham J. in the case of *In re Agricultural Wholesale Society, Ld.* (2), and of Romer J. in *In re Wells.* (3)

Before dealing with these decisions I should state that I have been informed (and the information is in accordance with my own experience as to the practice) that ever since the decision in *In re Whitaker* (1) it has been the practice in

(1) [1901] 1 Ch. 9.
(2) [1929] 2 Ch. 261.
(3) [1929] 2 Ch. 269.

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the Chancery Division in the administration of insolvent estates to apply the rule as to the limitation of interest contained in s. 66 of the Bankruptcy Act, 1914, and the section of the earlier Act replaced by it, i.e., s. 23 of the Bankruptcy Act, 1890. The case of *In re Agricultural Wholesale Society, Ld.* (1), relates to the rules applicable to the winding up of an insolvent company under the Companies (Consolidation) Act, 1908. There were two questions. The first question related to the date from which interest was to be computed on a debt bearing interest and the second question to the rate at which such computation was to be made. The second question is the one material for consideration in this case. Sect. 207 of the Companies (Consolidation) Act, 1908, provides that in the winding up of an insolvent company registered in England or Ireland the same rule shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland as the case may be with respect to the estates of persons adjudged bankrupt.

The words are for all practical purposes identical with the words of s. 10 of the Judicature Act, 1875, and also with the words of s. 34 of the Administration of Estates Act, 1925, and r. 2 of Schedule I. thereunder, except that in the last mentioned section and r. 2 you find the additional words "and as to the priorities of debts and liabilities."

It may be that there is some distinction to be found between the present case and the case before Maugham J. on the actual facts, as was suggested by Mr. Stable in argument, but I am personally unable to see such distinction.

The attention of Maugham J. was not called to the decision of the Court of Appeal in *In re Whitaker* (2), nor was he reminded of the practice which has been followed in the Chancery Division limiting the rate of interest payable in respect of a proved debt to 5 per cent. until all other proved debts have been paid in full.

(1) [1929] 2 Ch. 261.
2) [1901] 1 Ch. 9.

I cannot help thinking that if such had been the case Maugham J.'s decision would have been different. With all possible respect to him I do not think that his judgment and that of the Court of Appeal in *In re Whitaker* (1) can be reconciled. In my view I am bound to follow the judgment of the Court of Appeal in preference to that of Maugham J.

The other case to which I was referred was *In re Wells.* (2) In that case Romer J. decided the precise point which is now before me, and held that s. 66 of the Bankruptcy Act, 1914, was not incorporated by s. 34 of the Administration of Estates Act, 1925, and the rules thereunder so as to apply in the administration of an insolvent estate. In deciding as he did the learned judge's attention (as in the case of Maugham J.) was not called to the decision of the Court of Appeal in *In re Whitaker* (1), nor was he reminded of the practice of the Chancery Division on the point. Indeed so far as I can see there was no argument of any kind, for counsel for the administratrix appears to have submitted to the Court that the case was governed by the decision in *In re Agricultural Wholesale Society, Ld.* (3), although it was his duty as representing the administratrix to have argued to the contrary and to have called the learned judge's attention to the relevant authorities.

In these circumstances and without any disrespect to the learned judge, I conceive it to be my duty to refuse to follow his decision and to follow that of the Court of Appeal in *In re Whitaker* (1), more especially in view of the fact that to follow the decision in *In re Wells* (2) would of necessity result in a departure from what has been the settled practice of the Court for at any rate nearly thirty years.

I will therefore answer the question asked by the summons by declaring that the provisions of s. 66 of the Bankruptcy Act, 1914, are applicable to the present case.

Solicitors for the plaintiffs: *Woolfe & Woolfe.*

Solicitors for the defendant: *Stephenson, Harwood & Tatham.*

(1) [1901] 1 Ch. 9.
(2) [1929] 2 Ch. 269.
(3) [1929] 2 Ch. 261.

P. J. B.

In re DRABBLE BROTHERS.

[18 of 1928.]

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CLAUSON
AND
FARWELL
JJ.
March 24, 25.
C. A.
May 16.

Bankruptcy—Fraudulent Preference—Payment with View of giving Preference —Payment by innocent Debtor on Advice of Agent—View of Agent to prefer—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 44.

If a principal leaves the control of his business in the hands of an agent so that the agent is employed to determine which of the creditors of the principal shall be paid, when they shall be paid, and why they shall be paid, a payment made by such an agent with an intention to prefer a creditor of his principal is, in the event of the bankruptcy of the principal, a fraudulent preference by the principal within the meaning of s. 44 of the Bankruptcy Act, 1914.

It makes no difference that the agent had not authority to sign the cheques he drew and presented to his principal, nor that the principal when signing them had no intention to prefer any creditor, but honestly believed the payments so made to be proper and in the ordinary course of business.

A firm of builders, having contracted to erect houses at S., employed T. as their salaried agent to control and manage the purchase of and payment for building materials, and generally to supervise and advise the firm on financial matters in relation to the contract. The partners had no knowledge as to the terms upon which the materials supplied had in fact been purchased, nor were they aware of any of the circumstances relating to any payments they in fact made. They signed cheques drawn by the agent as and when he prepared and presented them, but the agent had no right to make any payment except by cheques signed by his principals. The partners having become bankrupts it appeared in the bankruptcy proceedings that less than three months before the date of the receiving order, T., intending to prefer S. & Co. (creditors of his principals) and then well aware of his principals' insolvency, presented to F. D., the managing partner, two cheques which T. had drawn and which F. D. signed without inquiry in the honest belief that T. intended thereby to make proper payments but which were in fact intended and devoted by T., one to the extent of 100*l.* in payment of a debt due by his principals under a contract other than the S. contract, and the other to the extent of 647*l.* in payment for goods delivered by S. & Co. on credit terms not then expired :—

Held, by the Divisional Court (Clauson and Farwell JJ.), overruling the county court judge, that as F. D. made the payments bona fide and honestly believing that they were properly made in the ordinary course of business and with no view of giving S. & Co. a preference over other creditors, the payments were not fraudulent and void within s. 44 of the Bankruptcy Act, 1914.

Held, by the Court of Appeal, reversing the Divisional Court, that the partners as principals were bound by the acts of their agent T. when he, acting within the scope of his employment and as their agent, made the payments in question, and that the act of the agent in making the payments with knowledge of the principals' insolvency and with a view of giving a preference must be treated as the act of the principals.

Principle stated by Lord Halsbury L.C. in *Blackburn, Low & Co.* v. *Vigors* (1887) 12 App. Cas. 531, 537, 538 applied.

APPEAL from the Chesterfield County Court.

Upon the hearing of a motion before him by the trustee in the bankruptcy of Drabble Brothers, builders (hereinafter referred to as "the debtors"), the learned county court judge made a declaration that the payment to J. J. Swan & Co., Ld., the respondents to the motion, on September 6, 1928, of 100*l.*, and on October 4, 1928, of 647*l.*, were void as fraudulent preferences under s. 44 of the Bankruptcy Act, 1914, and ordered Swan & Co., Ld., to pay those sums to the trustee.

The ground of his decision was that the debtors as principals were bound by the acts of their agent when he, acting within the scope of his employment and as the authorized agent of the debtors, made the payments in question; that the act of the agent in making the payments with knowledge of the debtors' insolvency and with a view of giving a preference must be treated as the act of the principals.

The facts, taken in substance from the judgment delivered by Clauson J., are as follows:—

George and Frederick Drabble, the debtors, carried on business as builders and contractors in partnership under the style of "Drabble Brothers," at Mosborough, in the county of Derby, and at Sutton Trent Housing Estate, Trent Vale, Stoke-on-Trent.

On November 2, 1928, a receiving order was made against the debtors on their own petition, which was presented within three months of the payments in question, and on the same day they were adjudicated bankrupt, and a trustee was appointed of the joint and several estates of the bankrupts.

For some time before May, 1928, the debtors had been doing business with one Tiley, a timber merchant of Nottingham, who acted as agent for various firms, including

Swan & Co., Ld., the present appellants, from whom the debtors, in the course of business, bought a considerable quantity of building material.

In 1927 Tiley brought to the notice of the debtors an invitation issued by a body known as the "Sutton Dwellings Trust" for tenders for the erection of houses at Stoke-on-Trent, with the result that about April 4, 1928, a contract (hereinafter referred to as the "Stoke contract") was entered into between the debtors and that body for the erection of 198 houses by the debtors; and, as apparently F. Drabble, the active partner in the matter of the Stoke contract, did not feel himself capable of managing the business side of so important a contract, Tiley was employed by the debtors as their technical adviser at a salary with allowances for expenses. The period of his engagement was from the commencement until the completion of the works under the Stoke contract. He was employed to manage the business and financial side of the contract. His duties were to order the necessary building materials and to see to the payment of the goods by preparing cheques for the payment of the creditors. The practice was for Tiley to lay the cheques so prepared before F. Drabble for his signature and then for Tiley to dispatch the cheques so signed to the payees. Tiley was not put in charge of the debtors' funds or of their banking account. No payment was or could be made out of the debtors' cash in respect of commitments connected with the contracts of which Tiley was in charge except by cheque drawn and signed by one of the debtors and, in practice, by F. Drabble, who was the sole partner actively concerned with the Stoke contract. The debtors had full knowledge that Tiley had expectations of being paid commission by Swan & Co., Ld., and some of the other firms with whom the debtors, through Tiley, did business, and acquiesced in his accepting commission from them in respect of orders for materials supplied to him for the purposes of the Stoke contract.

On September 6, 1928, Tiley was minded to pay Swan & Co., Ld., the sum of 1472*l.*, and for that purpose he prepared a cheque in their favour and, in the usual course of business, procured F. Drabble's signature to it. To the extent of 1000*l.* the payment was for goods in regard to which the period of credit had expired, and in ordinary and due course of business the debtors were bound to pay to Swan & Co., Ld. As to a further part — namely, of 372*l.* — the propriety of the payment of that sum was not questioned. But as regards the balance of 100*l.*, the inclusion of which in the cheque for 1472*l.* was in question, although that sum was due to Swan & Co., Ld., it was not due in connection with the Stoke contract, with which alone Tiley was concerned; it was due in respect of an entirely different contract, known as the Sheffield contract, with which Tiley, as between himself and the debtors, had no concern. In that contract he was interested only in the sense that he had some expectation of commission from Swan & Co., Ld., in respect of that payment of 100*l.* It was admitted that at the date when that cheque was signed or on the day following the debtors were, in fact, unable to pay their debts as they became due; and there was the further fact that the debtors were adjudicated bankrupt on their petition, which was presented less than three months from the date when the cheque was dispatched.

On October 4, 1928, Tiley prepared another cheque for 1497*l.* 13*s.* 3*d.* in favour of Swan & Co., Ld., and in the usual course procured the signature to it of F. Drabble. The terms arranged between the debtors and Swan & Co., Ld., for payment were the terms usual in the building trade—namely, "net in 30 days." It was admitted that the goods had not to be paid for until the first day of the month but one after delivery. It was further admitted that the accounts so paid by means of that cheque were not only for goods delivered in August, but for goods delivered up to September 22, 1928, and that the amount due to Swan & Co., Ld., for the August deliveries was 850*l.* 0*s.* 6*d.*, payment for which, according to the usual terms of credit, fell due on October 1. The balance of 647*l.* 12*s.* 9*d.* was paid in respect of goods delivered on the site between September 1 and September 22, 1928, payment for which was not due and could not be demanded until November 1, 1928, with the result that Swan & Co., Ld., received payment of 647*l.* 12*s.* 9*d.* before the term of credit expired. The Court found as a fact that Tiley, fully aware of the debtors' insolvency, procured both the cheques to be drawn by the debtors, because he desired that Swan & Co., Ld., should have preference over other creditors. Further, the Court was satisfied that F. Drabble had no knowledge that the payment of the 100*l.* was made in connection with any other than the Stoke contract, and thought that the whole of the 1497*l.* 13*s.* 3*d.* was then due and owing to Swan & Co., Ld., and personally had no intention when he signed the cheques of giving that firm a preference.

Cave K.C. and *G. C. Allsebrook* for Swan & Co., Ld. The payments in question were not made with a view to prefer Swan & Co., Ld., within the meaning of s. 44 of the Bankruptcy Act, 1914. The "view" in that section is the view of the person making the payment. It was F. Drabble who made the payment, and he had no view of giving a preference. Drabble's authority to Tiley did not extend to drawing cheques on the debtors' banking account: all payments to creditors were made by F. Drabble himself. Here the debtors made the payments, and they were innocent payers. Although Tiley, their employee, procured the payments to be made with a view to prefer Swan & Co., Ld., it was only the view of Tiley. The debtors ought not, upon the proper construction of the section, to be affected by the view which Tiley had in his mind, for otherwise a view entertained by their employee of which the debtors were ignorant would have the serious result of causing the debtors to commit an act of bankruptcy. In *Ex parte Blain* (1) Brett L.J. said: "I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorised, and of which act he has had no cognizance." One of the conditions which s. 44 requires is that the dominant motive with which the payment is made is a desire

(1) (1879) 12 Ch. D. 522, 529.

to prefer that creditor to whom the payment is made, and the mere fact that the payment results in a preference is not enough: *In re Cohen.* (1) That case shows that the view must be that of the debtors themselves.

Sir Gerald Hurst K.C. and *Allan Walmsley* for the trustee in bankruptcy. The only function exercised by F. Drabble was to put his signature to the cheques. The payments were made by the debtors through their agent. The authority given to Tiley was to obtain the materials, keep accounts, receive and check allowances, determine what and when payment should be made, and prepare cheques for Drabble to sign. No cheque was sent to any creditor without a covering letter from Tiley explaining the items for which payment was being made. In short, he had full authority to act as the debtors' financial manager in the matter of the Stoke contract, and to make the payments which are challenged here. The dictum relied upon in *Ex parte Blain* (2) does not apply where (as here) the payments were within Tiley's authority. The authority was as complete as if the debtors had handed over to Tiley a bundle of cheques signed, but otherwise blank, for the purpose of paying the trade creditors. If in fact a preference has been given, it is prima facie a fraudulent one within s. 44, and cannot be justified except by showing affirmatively an intention, caused by pressure, threats, fear or the like, strong enough to displace the prima facie intention to be gathered from the mere fact of preference: per Sargant L.J. in *In re Cohen.* (3) F. Drabble, by signing the cheques, caused a voluntary preference to be given to the appellants which was fraudulent within s. 44.

[CLAUSON J. The voluntary signing of the cheques may be explained: see passage in judgment of Sargant L.J. in *In re Cohen* (3), where he speaks of "a preference in fact to a particular creditor which is apparently voluntary and is wholly unexplained." Here it may be explained by the methods of business adopted by the debtors and the state of mind of F. Drabble.]

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(1) [1924] 2 Ch. 515, 533, 537.
(2) (1879) 12 Ch. D. 522, 529.
(3) [1924] 2 Ch. 515, 543, 544.

[FARWELL J. Can you look into the mind of another when the act of the debtors is the cause of the preference?]

The payment was made by the composite action of the debtors and Tiley. It was made with the view or object which Tiley had in his mind, to prefer a particular creditor. When a principal employs an agent to make payments, s. 44 does not say that the view to prefer must be that of the principal in order to render the payment fraudulent and void.

By s. 265 of the Companies Act, 1929, the view of a company's manager to prefer is to be attributed to the company in the event of a winding up. The ordinary law governing the relations between principal and agent must be applied. The debtors, therefore, as principals must be held responsible for the view to give a preference with which their agent, in the course of his employment, made the payments, and not the less so, because the preference was given by the agent to benefit himself: *Lloyd* v. *Grace, Smith & Co.* (1) Having regard to the particular course of business followed by the debtors, the payments were, in substance, payments by Tiley, who was authorized by the debtors to choose which of the creditors should be paid to insert their names and the amounts in the cheques and dispatch them to the payees, after they had been signed by F. Drabble, who must be treated as a mere cypher in the process of payment. Applying the ordinary law relating to principal and agent, the payments and the view which Tiley had in making them must be treated as the payment and the view of the debtors, his principals. Even if, on the right view, it be held on the narrow ground that it was he who signed the cheque, that F. Drabble and not Tiley made the payments, yet he relied on Tiley to examine the accounts and give him proper advice as to the creditors to be paid and what amounts, and at what times they should be paid. He left it so much to the discretion and judgment of his agent as to put it into the power of his agent to make a fraudulent preference, and therefore he should be deemed to have authorized and adopted his agent's "view." Consequently the creditors

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(1) [1912] A. C. 716.

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who have not been preferred ought not to suffer: *In re Lamb* (1); *In re Bowles' Mortgage*. (2)

CLAUSON J. The present appeal is by Swan & Co., Ld., who maintain that the trustee has entirely failed to establish that the payments were made within the meaning of s. 44 of the Bankruptcy Act, 1914, with a view of giving them a preference over other creditors. The circumstances are somewhat peculiar. For reasons which will appear shortly it will not be necessary for me to travel through the whole of the somewhat complicated facts which were before the learned judge. The learned judge has delivered a most careful judgment with most careful findings of fact with which in substance Swan & Co., Ld., do not quarrel, and it is on one point, and I think on one point only, that I feel myself unable to agree with the learned judge's train of reasoning, but that one point is a crucial one, and, if he is wrong on that, the claim that is based on fraudulent preference must fail.

It would appear that George Drabble, one of the partners, took no share at all in the transactions with regard to which the question arises, but it was recognized that, if it were established that, in fact, the payments which are challenged were made by the one partner, F. Drabble, with a view to giving a preference, and would accordingly be fraudulent and void, the payments would necessarily have to be treated for the purposes of this case as payments made by the debtors by way of fraudulent preference. I shall make no further reference to the fact that F. Drabble, in what he was doing, was not acting as the sole trader, but was acting as a member of a firm. [His Lordship then stated the facts above set forth and continued as follows:] The question for determination is whether this payment of 100*l*. was made with a view of giving the payees, Swan & Co., Ld., the present appellants, a preference over the other creditors. Now it is clear, as the learned judge has found—and nobody quarrels with his finding—that Tiley procured Drabble to draw the

(1) (1887) 4 Mor. 25. (2) (1874) 22 W. R. 817.

cheque so as to include this sum of 100*l.*, because he, Tiley, desired that Swan & Co., Ld., should have a preference over the other creditors. The state of mind of F. Drabble was that when he signed the cheque he believed it was entirely for goods supplied for the Stoke contract and he did not know that the figure included 100*l.* for the Sheffield contract. He had no intention of making the payments of 100*l.* or any other sum in respect of the Sheffield contract. As a matter of fact, it had always been the practice for him to deal entirely apart from Tiley with the question of any payments required by reason of the Sheffield contract. This 100*l.* was a payment accordingly which Mr. Drabble had no intention of making. So far as he was concerned the payment was a mistake. Under those circumstances, it appears to me to be impossible to predicate that this payment of 100*l.* was made by F. Drabble with a view of giving Swan & Co., Ld., a preference over other creditors. He believed that the payments which he was making by this cheque of 1472*l.* were payments which in the ordinary routine of business had to be paid, and accordingly he made this payment of 100*l.* under an entire misapprehension, but certainly with no thought in his mind, still less with any view, of giving the creditor a preference over the other creditors.

I will now deal with the payment of October 4, 1928. It was the next monthly cheque which was prepared by Tiley and placed by him before Mr. F. Drabble, and was a cheque for 1497*l.* 13*s.* 3*d.* 850*l.* 0*s.* 6*d.* of that was a sum which was, in any view of the matter, due to Swan & Co., Ld., in the ordinary routine according to the ordinary terms of credit for goods which had been supplied in August, and accordingly had to be paid for on October 1. The balance of 647*l.* 12*s.* 9*d.*, which the learned county court judge has found to have been paid by way of fraudulent preference, was paid for goods which were on the site during September and for which payment could not on the original terms of credit be demanded by Swan & Co., Ld., until November 1. I will assume that under those circumstances this payment was one which ought not to have been made in the ordinary routine to

Swan & Co., Ld., but was what has been spoken of as a voluntary payment.

As regards the state of Tiley's mind I will assume—and I do not think there is any real question about it—that he desired this payment to be made to Swan & Co., Ld., because he desired them to have a preference over other creditors, and he was moved by that desire, to some extent, because of his interest in commissions which he was going to get or hoped to get.

What was F. Drabble's state of mind as regards this payment? He swore that "his idea was that Tiley was paying current accounts." The learned county court judge's finding is: "As to the payments to the respondents of 100*l.* on September 6, and 647*l.* 12*s.* 9*d.* on October 4, 1928, the bankrupt George Drabble knew nothing whatever about it. The bankrupt Fred Drabble signed cheques drawn by Tiley, which included the above two amounts. Fred Drabble did not know that 100*l.* was included in the September cheque in respect of the Sheffield debt. He had no intention whatever of making any such payment." Then the learned judge proceeds to sum up, as regards the two cheques, his finding in this way—and it is a finding which in fact was not quarrelled with: "Personally, therefore, Fred Drabble had no intention when signing the cheques of giving respondents a preference over the other creditors."

Now of course, as regards fraudulent preference, unless the Court can find facts in the terms of s. 44, there is no fraudulent preference.

The point at which I, for myself, part company with the learned county court judge comes at this stage. The learned judge continues his judgment in these terms: "But Tiley was the servant and agent of the bankrupts and the person in control of the financial side of the bankrupts' business in connection with the Stoke contract. The payment of accounts was within the scope of his employment. I have found that he knew the bankrupts were insolvent in September and October, 1928, and that the payments of 100*l.* and 647*l.* 12*s.* 5*d.* were made by him with knowledge of the insolvency and with the view of giving the respondents a preference over the other creditors. The respondents contended that Tiley's motive could not be attributed to the bankrupts so as to constitute a fraudulent preference. I do not accept this contention. As the bankrupts confined themselves to building work and left the management and control of the financial side of their business to Tiley, and took no part in it themselves, the acts of Tiley while managing and controlling the financial side of the bankrupts' business must be treated as the acts of the bankrupts."

Now with regard to this passage in the judgment I feel bound to hold that there is no evidence to support it. The finding is that the payment of accounts was within the scope of Tiley's employment. If that means that Tiley was employed to hand out, according to his views of what was right and proper, the cash of the firm to the persons to whom money was owing under the Stoke contract, I can only say that the evidence does not support that finding. I think probably the learned judge really does not mean that; I think what he means is that it was within the scope of Tiley's employment to make up his mind what accounts ought to be paid, and to take the proper steps for seeing that those accounts were paid. That may be so. But the key to the whole matter in my view is that F. Drabble kept in his own hands the control of the firm's cash, and nothing was paid out except on his cheque. That Tiley was employed to do the work of finding out what ought to be paid and advising what ought to be paid no doubt is the fact, but the payments, in my view, were not made by Tiley nor was he employed to make them. The payments were made by F. Drabble. It is true that the course of the business was this, that Drabble, having signed a cheque which Tiley put before him, did not himself put it in an envelope and send it to the payee, but handed it to Tiley for Tiley to put in an envelope to send to the payee. As a matter of fact Tiley was in the habit of despatching cheques to the payees with, what I may call, personal covering letters of his own. In my view, in doing that Tiley was taking no part in making the payment, except in the sense in which, when one sends a cheque through the post, the Postmaster-General takes a part in conveying the cheque to the person to whom the payment has been made; but Tiley's share in thus making the payment seems to me to be something which, for the purpose in hand, may be neglected. He was, as has been said in the course of the case, when the cheque was sent, a mere postman. If the course of business had been that Drabble drew the cheque on the bank, for whatever the sum was, in Tiley's favour, and said to Tiley: "Here is the money; now you go and pay it or not as you think fit," the position might have been different; but no payment was made, except by cheque drawn in favour of the payee by F. Drabble.

Accordingly it appears to me that where the learned judge has gone wrong is in treating Tiley as a person by whom, as agent on behalf of the principals, the debtors, a payment was made. It may be—as to this I say nothing, because the matter may have to be considered in some other case—that when a principal delegates to an agent the making of payments of a particular class, then in considering whether a payment so made can or cannot be treated as a fraudulent preference, the state of mind of the agent so employed must be brought into account and considered. That problem is not, in my view, the one before us. In my view these payments were in each case made by F. Drabble and by him alone in any sense which is at all material, and the responsibility for the payment so made by him was on him alone, and it is his state of mind and the view with which he made the payment with which the Court has to deal and in which it has to come to a conclusion as to whether the case falls within s. 44.

As to his state of mind there can be no question. I have already stated the facts, I think, sufficiently from that point of view. F. Drabble was, if I may use the expression, perfectly innocent in the matter; he had no view of giving Swan & Co., Ld., a preference over other creditors.

Under those circumstances the trustee in bankruptcy appears to me to have failed to establish that the case falls within s. 44.

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If my learned brother agrees with the view which I am expressing, the result must necessarily be that the appeal will succeed and the motion must be dismissed, with the consequence that the trustee in bankruptcy must pay the costs of this appeal and the motion in the Court below.

FARWELL J. I agree. As we are differing with the learned county court judge, and in deference to Sir Gerald Hurst's argument, I will state in very few words the reason why I come to this conclusion.

The facts as found by the county court judge, so far as they are relevant, appear to be these: F. Drabble, one of the bankrupts, paid the two accounts in question by a cheque signed by himself, drawn on the partnership account, and made out in favour of the creditors. Those cheques were drawn by Drabble, he bona fide and honestly believing that they were proper payments made in the ordinary course of business, with no intention and with no view of giving the payees a preference over other creditors.

The cheques when signed were handed to Tiley by F. Drabble for the purpose of being sent on to the creditors. The evidence does not indicate in any sense that Tiley had any authority to deal with those cheques in any way at all, except by sending them on to the creditors. The evidence does not show that he had any authority from either of the Drabbles to withhold those cheques, if he did not think it right to send them on, or to deal with them in any way at all, except by sending them to the creditors. Tiley was a person who, in connection with this particular Stoke contract, had the management of the bankrupts' business as regards the financial side. He was fully aware of the state of the finances of the bankrupts, and he did a great deal of the financial business, I think almost the whole of the financial business, for the bankrupts, and in that sense was their agent. But as I understand the evidence, and as I think the learned judge intended to find, Tiley had no authority to make payments on behalf of the bankrupts; that is to say, he had no authority to draw on the bankrupts' account, and the actual payment, in the sense of drawing the money and signing a cheque for the money, was in the hands of F. Drabble, who did it. He drew the cheques on every occasion when money was required. Tiley, as I have said, was well aware of the state of the bankrupts' business, and Tiley did desire that these particular creditors should be paid, in order to obtain a benefit for himself, and I think there is no doubt that, so far as Tiley was concerned, he desired those creditors to be paid with a view to giving those creditors a preference over others.

Under those circumstances we are asked to hold that—notwithstanding that F. Drabble paid these debts in the sense that he did the act which was necessary, namely, signing the cheque—and that he himself was completely innocent and acted honestly with no intention of giving a preference ; yet, none the less we are asked to hold, and the learned county court judge has held, that those two payments were fraudulent preferences.

In my judgment it is impossible to come to that conclusion, having regard to the language of s. 44 of the Act. As I read the section, a payment, in order to be fraudulent preference, must be a payment made, in the view of the person who makes the payment, for the purpose of giving a preference to a particular creditor over others. If the person who in fact makes the payment has no such intention or view at all, then the state of mind of some other person, be he the agent of the employer or some other person who may in some way have induced the signing of the cheque, is in my judgment wholly irrelevant.

I am not prepared to say that, if a person entrusts the whole of his business, including the payment of accounts, to an agent, and the agent draws cheques and pays accounts having in his mind the intention of giving a preference to one creditor, the mere ignorance of the principal would prevent such payments being fraudulent preferences. It may well be that in that case, the payment being a payment made by the hand of the agent on behalf of the principals, and being in fact the payment of the principal, the mind of the agent for this purpose must be treated as the mind of the principal. I am not deciding that, but that may be so. My difficulty in this case is that the payment appears to have been made by F. Drabble, and I do not see how we can substitute for F. Drabble's mind the mind of Tiley.

For these reasons I agree with what my learned brother has said. I think the learned county court judge has come to a wrong conclusion, because he has really done what I think one cannot do, and said that although it was Drabble who signed the cheque, which was the one necessary act to enable payment to be made, the purpose of Tiley should be taken as the purpose of Drabble.

For these reasons in my judgment the appeal must be allowed.

H. C. H.

C. A.

The trustee in bankruptcy appealed. The appeal was heard on May 16, 1930.

Sir Gerald Hurst K.C. and *R. A. Willes* for the appellant.

Cave K.C. and *G. C. Allsebrook* for the respondents Swan & Co., Ld.

The arguments were substantially the same as those used before the Divisional Court. In addition to the cases there cited *Blackburn, Low & Co.* v. *Vigors* (1) was also referred to.

LORD HANWORTH M.R. This case raises an interesting and important point, the decision of which I am told may have a wide application. We have had the great advantage in this case of the very carefully considered judgment by His Honour Judge Procter, delivered after he had had two days' evidence before him and had taken time to consider his judgment. It is complete in its statement of the facts and in the application of the law to those facts. The learned county court judge held that there had been in this case a fraudulent preference, and that the creditors who had been preferred were bound to hand over to the trustee in bankruptcy two sums which they had received, one being a sum of 100*l.* and

(1) 12 App. Cas. 531, 537, 538.

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the other being a sum of 647*l.* The Divisional Court in Bankruptcy have set aside that judgment, and have held that there was no fraudulent preference. The ground on which the Divisional Court so held was, not that they differed from the facts as found, but that in their opinion there was no view or object or motive to prefer the creditors which could be imputed to the debtors. On that ground they held that there had not been a fraudulent preference. From that decision the trustee in bankruptcy appeals to this Court. I must quite shortly summarize the facts which are accurately stated by the county court judge in his judgment.

A firm consisting of two brothers, George Drabble and Frederick Drabble, carried on business in partnership, and in the year 1927 they took into their employ, on some terms which are not very clear, a man named Tiley. Tiley was a man who bought goods from builders' merchants, he was in touch with a number of builders' merchants, and was able to provide from those merchants the materials which were required by the Messrs. Drabble in the course of their building operations. He received a salary and allowances from Messrs. Drabble, but he was also allowed to receive some commission from the builders' merchants whose goods he supplied or got supplied for Messrs. Drabble's undertakings. Although the fact that he was taking these commissions was known to Messrs. Drabble, I cannot help at once stating that his position affords an illustration of how unfortunate it is that a man should be placed in a double position, a position in which his duty was to serve his employers, Messrs. Drabble, and whose interest was concerned in the sums which would be paid by his employers to builders' merchants, for the builders' merchants paid him a commission on the sums which they received from Messrs. Drabble. On reading the correspondence which passed, it is plain from the outset and in every letter, that Tiley was occupying a dual position, and was engaged in considering the interests of the merchants, which in a sense were his own interests; for the amount of money paid to the merchants enhanced his own commission. At the same time, he owed a duty to Messrs. Drabble, who employed him, and a large part of whose business he had to conduct.

The facts relating to these particular preferences are not either complicated or difficult. It appears that Tiley had an opportunity of getting a contract for Messrs. Drabble to build 198 houses, which were to be built for a sum to be paid to Messrs. Drabble of 78,000*l.* In a letter which we have had placed before us, dated April 6, 1928, Tiley writes to the present respondents to the appeal, J. J. Swan & Co., Ld., and says this: "Stoke-on-Trent. Reference enclosed inquiry. Please go into the matter carefully and let me have your keenest prices for decent building red. Bear in mind that I have the handling of this order and could no doubt help you out of any very difficult lines. I should particularly like you to handle some of this business. First delivery will be required in about three weeks, and regular monthly deliveries will be taken of remainder. Please deal with this matter urgently as I want to get it settled. The lengths in the main are quite reasonable. Yours faithfully, W. H. Tiley. If you like, I will quote myself for the mouldings. Whilst prices have to be competitive this order will not be unduly cut in price. W. H. T." Consider what the position of Tiley was. His employers had obtained this contract for 78,000*l.* to build those houses, and he writes to Swan & Co., Ld., who are carrying on business and able to supply materials, that he hopes that they may have a part of the handling of the order, and he says to them that he "could no doubt help you out of any very difficult lines," and also "Whilst prices have to be competitive this order will not be unduly cut in price." It appears quite clear from that letter that he was acting the part of Mr. Facing-both-ways and finding the difficulties which belong to that situation. In consequence of the position that Tiley held, Swan & Co., Ld., did supply a certain amount of material required for building these houses at Stoke-on-Trent.

At the outset of my judgment I desire to repeat what we have said in the course of the argument—it is a matter to which full publicity should be given—that no charge of any sort is made against Swan & Co., Ld. They have acted perfectly honourably, and although under the bankruptcy law and our decision they will be compelled to hand over the sum which they have received, no blame attaches to them, and indeed no criticism need be offered against their conduct in having received money in the ordinary course of business.

That letter was the first which passed between the parties. Then on May 4 there is another letter, in which Tiley writes to them: "No advices or invoices for this Stoke contract must be sent to Mosborough, but advices must be sent to the job at Stoke and all invoices to W. H. Tiley, 16 Tithby Drive, Sherwood, Nottingham." Then on May 4 a letter is written by Tiley to Swan & Co., Ld.: "Drabble Bros. Concerning the order for three crowns E 1 x 5 Red P T G for Sheffield, which was marked 'Very urgent,' I regret that I have had no advice of despatch and shall be glad if you will get order off at once. These delays greatly inconvenience customers. With regard to Stoke you will be pleased to learn that I have now arranged with the architect that full payment will be made once monthly for all goods on the site, on production of invoices. This is in addition to payment for work, and should please you as you will be absolutely certain of your money and that it will be received promptly. I would also mention that I am personally dealing with all accounts on behalf of these friends and will see that regular cheques are obtained for you." The answer by Swan & Co., Ld., is dated May 7, and contains the phrase: "We trust you will see that we get our cheque." After that we have the evidence given by F. Drabble himself, telling us that in June he discussed the finance of the Stoke contract with Tiley.

Putting those facts together as they stand, for a moment, I think it is plain that to the knowledge of Tiley Messrs. Drabble had some difficulty in financing this contract. We are told that it is a much larger contract than they usually dealt in, and building of this sort, involving the payment to them of 78,000*l.*, obviously required a considerable margin at the bank in order that they might carry on the business satisfactorily both to themselves and to their merchants who were sending them the materials with which to build. After that conversation with F. Drabble about financing, we find Tiley writing on July 10 to Swan & Co., Ld.: "As mentioned on the 'phone there will be a cheque to-night or to-morrow. You will have it by Thursday at latest. Glad to hear that Sheffield, etc., A/c. is settled up to end of April." It will be noted that in that letter once more Tiley says that the receipt is to be sent to him, Tiley, and he writes on the 12th, with reference to a cheque which had been sent for 607*l.* 8*s.* 6*d.*: "I shall be glad if you will let me have my commission as above statement per return and oblige." On August 15 there is this letter: "Drabble Bros. Copies of statements of accounts to hand. With regard to Stoke the Sutton Trustees meet on the first Wednesday in each month and Drabble's cheque is sent the following day. As soon as this is received I will immediately make out cheques and forward same. I will see that cheque for the full amount is made out for you and you will receive same on the 8th Sept. next. You can rely that I will look after your interests in respect to this. With reference to Sheffield A/c. I am not personally dealing with these accounts, as I am not working these contracts for them, but I will mention the matter to Mr. Drabble at Stoke this week and ask him to do something forthwith. The difficulty is that he has over 3000*l.* tied up in retention moneys on Sheffield district contracts and in addition has to finance Stoke. I am not willing that moneys from Stoke should be utilised in the payment of Sheffield accounts, and am keeping same quite separate. I will write you immediately I have chatted over the matter with Mr. Drabble." After that, two cheques were sent. A cheque was sent for 100*l.* on account of the Sheffield matter on September 6.

But I pause there to consider what was the position of Tiley in reference to this business. Quite apart from any question that arises in bankruptcy and of fraudulent preference, the evidence is all one way, that Messrs. Drabble were in some difficulty over the finance of this undertaking, that so far as Stoke went, Tiley was in command of the financial side of it, that he had an opportunity of taking orders, and that he had committed himself to the statement that he would endeavour to get the money paid in due course to Swan & Co., Ld., and further, from the chat that he had had with F. Drabble, he knew the difficulties of the firm, the difficulties arising from money tied up, and the like, and also that with regard to the Sheffield account, although he was keeping these accounts quite separately, he would have the opportunity of a chat with F. Drabble, which might enable him to send on to Swan & Co., Ld., a sum of 100*l.* in respect of the contract independently of what has been called the Stoke-on-Trent contract. That is a fair picture of the business as it stood then in September. The cheque is sent for 100*l.* After that there pass one or two more letters. On September 8 Tiley writes to Swan & Co., Ld.: "I did my best for you regarding a goodly cheque which I personally posted to you on Friday. You will observe that I included invoices up to the 8th of August totalling 1372*l.* and did what I could for you for Sheffield accounts by allowing 100*l.* making the total of cheque 1472*l.*" Then it deals with other small matters—deductions and so on—and then: "Will you please see that both receipts for Sheffield account and Stoke account are always sent to me." On October 4 some accounts appear to be paid and cheques are drawn. A total of twenty-four cheques is found on the table which was put in and marked "C" before the county court judge.

At that time Messrs. Drabble were entitled to a credit, which is called "thirty days net," from their merchants, and the meaning of it is this, that taking the date of the delivery of the goods, from which the credit starts, Messrs. Drabble were not required to make the payment until the first of the month after an intervening month had elapsed between that date and the date of delivery. Goods delivered in May would not have to be paid for until July 1, and goods delivered in June would not have to be paid for until August 1, for there is a clear intervening month between the date of delivery and the date of payment. More than that, it appears that an arrangement had been made as between the building owner of Stoke, that is the Sutton Trustees, and Messrs. Drabble, whereby they allowed, for the purpose of convenience and finance, a certain sum in each month, or, in each certificate given by the architect each month, for builders' materials delivered. It is not an unusual provision, and it enables the builder to pay his accounts more readily. Those payments so allowed in the certificate of the architect did not in any way alter the terms of payment between Messrs. Drabble and their customers. They were still entitled to the full thirty days net, and the customer had still to allow Messrs. Drabble the intervening month between the delivery and the date of payment. On October 4 there were twenty-four cheques to be drawn, and eighteen of these were drawn in respect of payments which allowed the full credit of thirty days net, but in the case of six of the merchants to whom cheques were to be drawn, there was a further payment in the cheque, for they were not required to give the full thirty days net credit, so that payments were brought up to a much later date than Messrs. Drabble and the merchants required.

To take two illustrations. A cheque suggested for Swan & Co., Ld., is one which brings the account up to or covers the period from August 9 right up to September 22; that is, up to a date only twelve days before the date of the cheque. A cheque to the Doncaster Joinery Company, Ld., covers the period from August 31 to September 25, only nine days before the cheque is to be drawn. In the six cases, this system of cancelling the credit to which Messrs. Drabble are entitled is applied, and it so happens that those six merchants were the merchants who, under their terms of contract, were allowed to and did in fact pay commission to Tiley. The inference is irresistible, that with Tiley's knowledge of the peril of Messrs. Drabble's business, he made good the payments to those six merchants, not taking advantage of the full credit to which Messrs. Drabble were entitled, but making the payments up to a few days before the cheques were drawn, so as to enhance the value of the cheques paid to those six merchants, with the corresponding advantage to himself, that they would have received larger sums out of which the commission payable to himself was to be calculated. That is what was done, and I find it impossible to accept any other explanation than that he was minded to pay those persons who would render him a commission in priority and preference to other persons. If he had paid the creditors properly and obtained for Messrs. Drabble the full credit to which they were entitled, the sum out of which his commission would have been paid would have been considerably less. A cheque was sent to Swan & Co., Ld., and their reply on October 6 is: "We are very much obliged to you for getting through such a decent cheque from Drabble Bros. for this month." Unless those statements contained in the letters of Tiley were mere statements by an egotist who had some idea of pretending that he had power, if they are to be taken, as it seems they are, at their face value, they clearly indicate that Tiley was a man who was in charge of the keeping of the accounts and the payment of the accounts, and that Tiley saw to the payments.

In fact, on November 2 there was an act of bankruptcy, and a receiving order was made on the same day. The trustee was entitled to go back to a date anterior to the date on which the 100*l.* was paid in respect of the Sheffield account, and he made his motion asking that this sum of 100*l.* paid on September 6, and a sum of 647*l.* 12*s.* 9*d.* paid on October 4 to Swan & Co., Ld., should be repaid by them on the ground that they were fraudulent preferences within the meaning of s. 44. As I have said, it was held that they were, and the learned county court judge found this: "Tiley was the servant and agent of the bankrupts and the person in control of the financial side of the bankrupts' business in connection with the Stoke contract. The payment of accounts was within the scope of his employment. I have found that he knew that the bankrupts were insolvent in September and October, 1928, and that the payments of 100*l.* and 647*l.* 12*s.* 9*d.* were made by him with knowledge of the insolvency and with the view of giving the respondents a preference over the other creditors."

I do not think it is possible to differ from or even to challenge this finding of the learned county court judge; but the learned judges in the Divisional Court have taken a somewhat different view. They have said that the money was paid by F. Drabble, but that his evidence showed that his mind was really a blank and that any separate idea on the part of Tiley cannot be imputed to Messrs. Drabble. Now what was said by F. Drabble on this point was this: "4th October. I signed cheque for 1497*l.* 13*s.* 3*d.*" Of that I may say that 850*l.* was in ordinary course a matter in respect of which the full thirty days net credit is allowed, leaving only 647*l.* "Tiley made it out and brought to me to sign. He never said anything particular, except that it was for the ordinary routine. It was not ordinary routine to pay in October for goods supplied previous month. I thought it was for goods supplied in July. Nothing said to bring to my mind that it was for goods delivered in July. I never knew at any time when I signed cheques on what dates the goods had been delivered. My idea was that Tiley was paying the current accounts."

With reference to the passage where the learned county court judge has held that the payments were made by Tiley with knowledge of insolvency and with a view to giving to the respondents preference over the other creditors, Clauson J. says this: "With regard to this passage in the judgment I feel bound to hold that there is no evidence to support it. The finding is that the payment of accounts was within the scope of Tiley's employment. If that means that Tiley was employed to hand out, according to his views of what was right and proper, the cash of the firm to the persons to whom money was owing under the Stoke contract, I can only say that the evidence does not support that finding." It appears to me that when Clauson J. said that he must have forgotten the evidence to which I have referred and the statement that Drabble made, that although he signed cheques, he, F. Drabble, never knew at any time when he signed cheques, on what date the goods had been delivered. Then the learned judges held that the payments that were made were made in each case by F. Drabble, and by him alone, and that as the banking account could not be drawn upon by Tiley, the payment is a payment as to which Tiley had no part, and is the act of F. Drabble alone. I find it impossible to share that view. I think the evidence before the learned county court judge amounts to this, that F. Drabble retained his control over his banking account, but he himself exercised no determination as to the creditors to be paid or the amounts to be paid to them; all such details he delegated to Tiley, who was engaged in Drabble's business on terms which made him, Tiley, the servant and agent of Drabble in respect of that side of the business which had been placed by Messrs. Drabble within his sphere. It is not an unnatural severance of business; it is common enough in the business of large firms that it is parcelled out into different departments. F. Drabble, we are told, was a competent and practical builder, but it is plain that he was not a man who also combined with his qualification as a builder any clerical ability or any expert accountancy. All such matters he delegated to Tiley; and I think he did this not only in respect of the Stoke account, as is plain from the letters, but of all other matters on which Tiley had a chat with F. Drabble, including the Sheffield matter, either as a whole or at any rate as to a part which covered the payment of the 100*l.*

It has been stated by Lord Halsbury, in words which are quite plain, how far you can impute the knowledge of an agent to the principal. He says in *Blackburn, Low & Co.* v. *Vigors* (1): "Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal," and again, that "where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct."

(1) 12 App. Cas. 531, 537, 538.

Let me apply that principle to the present case. It is plain beyond all question that on all matters of finance F. Drabble was not in control at all. How much and to whom the payments were to be made had been delegated entirely to Tiley. It has been said that even so, it cannot be a fraudulent preference within s. 44. That section requires that three things shall be involved, first, the payment that is made must be by a person who is unable to pay his debts, as they become due, from his own money ; that clearly is the fact in the present case. Messrs. Drabble were unable to pay their debts as they became due. Secondly, that in fact the payment preferred one creditor over the others. It is plain that the payment of those two cheques and those other cheques on October 4 did give a larger sum to those six merchants than was allowed to the other eighteen. Thirdly, that the dominant motive, or you may call it, object or view with which the payment was made, was a desire to prefer that creditor to whom the payment was made. It is unnecessary to repeat what I have said was the purpose and aim and object of the payments made on October 4 to those six merchants, or why they were allowed larger payments than were made to the other eighteen. There was then this intention or object or view of preferring.

But it is said that you cannot have a fraudulent preference unless both the act of preferring and the motive are contained in and governed by one brain—that you cannot impute the intention and knowledge of the agent to the principal. That appears to me to be an unsound view. In the complexity of business it must be that in a number of undertakings the duties are severed into departments, and when F. Drabble undertook to sign any cheque that was put before him for any amount and to any person which should be chosen and determined by Tiley, he so far delegated his authority as to make the act and intention and the knowledge of Tiley his own, because Tiley, on those details of the finance, represented his principal, and thus made his, Tiley's, intentions, the intentions of his principal.

On the facts of this case it appears to me quite clear that the actions of Tiley and the intentions of Tiley can be and ought to be imputed to the principal, for Tiley was delegated by the principal to represent him, F. Drabble, in carrying out all this very necessary part of the business.

That being so, it appears to me that the point of law which is taken in the Divisional Court is not sound, that it cannot be held that there is a divergence between the responsibility of Tiley and the responsibility of his principal, but that the principal, F. Drabble, is to be held bound by the intentions of Tiley, and that in fact there has been a payment made by a person unable to pay his debts and with a view to giving six creditors, which include Swan & Co., Ld., a preference over the other creditors, and that payment is to be deemed, within s. 44, to be "fraudulent and void as against the trustee in the bankruptcy."

For these reasons the appeal must be allowed and the order of the learned county court judge must be restored, with costs here and below.

LAWRENCE L.J. I entirely agree, and will only add a few words. The point raised on this appeal is a short one, and no authority has been cited to us in which the facts were on all fours with the facts in the present case. The question may be stated in this way. Where a bankrupt has employed a person to manage and control the financial side of his business and has not concerned himself in any way with the manner in which that employee has performed his duty, can the creditor escape the consequences of s. 44 if it should turn out that the employee has made a payment to him with a view to giving him a preference over the other creditors of the bankrupt who at the time when the payment was made was unable to pay his debts as they became due? The learned judges in the Divisional Court, differing from the learned county court judge, have held that as the view to prefer was the view of the employee and not the view of the bankrupt, s. 44 has no application. The result of that decision, if it be right, would have far-reaching consequences.

There must be many concerns in which the principal leaves the financial side of the business to a cashier or other employee and does not trouble himself about the details of that part of the business or with the items comprised in the cheques which are brought to him for signature. It seems to me that it would lead to a strange result if it were held that a preferred creditor could successfully plead as a defence to a claim made against him under s. 44, that the bankrupt, when no longer able to pay his debts as they became due, had allowed his employee to remain in control of his finances without inquiring how his moneys were being employed, and that therefore the view to prefer admittedly entertained by the employee, who was aware of the insolvency of his employer, was not the view of the bankrupt, but was the view of the employee and consequently outside the section. Mr. Cave rightly contended that the view to prefer must be the view of the person making the payment, but in the special circumstances of the present case the knowledge and intention of the employee must in my opinion be imputed to the bankrupt and be deemed to be the knowledge and intention of the latter: see *Blackburn, Low & Co.* v. *Vigors.* (1) To hold otherwise in the case of a principal who has not taken the trouble to inform himself or who has deliberately not informed himself of what is being done on his behalf by his own employee, would, in my judgment, be opening the door widely to fraudulent preferences by traders minded to shut their eyes to what their employees were doing on their behalf.

For these reasons I agree the appeal ought to be allowed.

ROMER L.J. I agree. Notwithstanding the interesting argument we have heard from Mr. Cave, I am not satisfied that there is any reason why the principle "Qui facit per alium facit per se" should not apply to a fraudulent preference under s. 44 of the Bankruptcy Act. In my opinion (and I do not understand the Divisional Court to have come to any different conclusion) every payment made by an

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(1) 12 App. Cas. 531.

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agent of any person unable to pay his debts as they become due, acting within the scope of his authority in favour of any creditor of the principal with a view to giving such creditor a preference over the other creditors, should, if the principal subsequently is adjudged bankrupt on a bankruptcy petition presented within three months after the date of the payment, be deemed "fraudulent and void as against the trustee in the bankruptcy." And indeed any other view would lead to rather strange results, as Lawrence L.J. has just pointed out. In particular it seems to me that it would be impossible in partnership cases to say that any payment made was a fraudulent preference unless every single one of the partners had made the payment with the intention to prefer. If I am right so far, obviously it cannot matter whether the composite act which constitutes the fraudulent preference is performed by one agent or by many, as long as each agent engaged in the transaction acts within the scope of his authority. Supposing one agent has the power of selecting a particular creditor for preference and fixes the amount to be paid to him and the date of the payment, but another agent is entrusted by the principal with the performance of the mere ministerial act of drawing the cheque and making such payment directed by the first person, it would be impossible to say that that composite act was not a fraudulent act of preference.

What are the facts of the present case? The authority of Tiley did not indeed extend to enable him to make the actual payments, that is to say, to draw the cheques, but most assuredly he was the person who arranged when and in what order the creditors were to be paid, and how much should be paid to them from time to time. He was therefore the agent to whose discretion was entrusted the selection of the creditors and he was the agent to judge of whether and why a particular creditor should be paid. The mere fact that he did not possess the power of actually signing cheques does not seem to me to make any difference. In determining whether there was an intention to prefer a particular creditor, the fact that the ministerial act of signing the cheque was performed by F. Drabble, is, in my opinion, not sufficient to prevent the composite act of the two from being a fraudulent preference.

For these reasons, I agree that the appeal should be allowed, with the consequences that have been mentioned by the Master of the Rolls.

Appeal allowed.

Solicitors for appellant: *Peacock & Goddard, for R. W. Beswick, Hanley.*

Solicitors for respondents: *Geare & Son, for Cooke & Co., Nottingham.*

W. I. C.

C. A.
1930
May 30.

In re A DEBTOR.

[No. 247 of 1930.]

Bankruptcy—Money-lender—Loan—Judgment for Debt with Interest at Rate exceeding 5 *per cent.—Bankruptcy Notice—Non-compliance—Receiving Order—Validity—Moneylenders Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 9, *sub-s.* 1.

The provisions of s. 9 of the Moneylenders Act, 1927, do not prevent a money-lender who has obtained judgment for a debt which includes interest at a rate exceeding 5 per cent. per annum from serving a bankruptcy notice upon the debtor requiring payment of the judgment debt.

A money-lender presented a bankruptcy petition against his debtor upon which a receiving order was made, though the act of bankruptcy relied upon in the petition was non-compliance with a bankruptcy notice requiring the judgment debtor to pay the judgment debt, which in fact included interest at a rate amounting to 270 per cent. per annum:—

Held, that the receiving order was rightly made.

APPEAL by the debtor from a receiving order made against him by Mr. Registrar Mellor on May 1, 1930.

On October 1, 1929, the debtor borrowed from the petitioning creditors, a firm of money-lenders, a sum of 50*l.*, and, as required by s. 6 of the Moneylenders Act, 1927, signed an agreement addressed to them, which was in the following terms: "I am willing to borrow from you on the 1st day of October, 1929, the sum of 50*l.* 0*s.* 0*d.* with the sum of 30*l.* 0*s.* 0*d.* for interest being at the rate 270*l.* per cent. per annum and upon the terms of a promissory note to be as hereunder :

Copy of Promissory Note.

80*l.* 0*s.* 0*d.* London, 1st Oct., 1929.

I promise to pay [the petitioning creditors at their address] the sum of eighty pounds on the 20th day of Dec., 1929, and in the event of default in payment of this sum or part thereof then so much of the balance of 50*l.* 0*s.* 0*d.* as represents the balance of the principal remaining unpaid together with the proportionate part of the sum of 30*l.* 0*s.* 0*d.* charged for interest to the date of such default shall immediately become due and payable together with interest on the amount then remaining due as aforesaid whether in respect of principal or interest on that sum at the rate of 48 per cent. per annum from the date such default until payment. The amount of the principal advanced in respect of the said sum of 80*l.* 0*s.* 0*d.* was 50*l.* 0*s.* 0*d.* and it was advanced on the 1st day of October, 1929. The interest of 30*l.* 0*s.* 0*d.* is equivalent to interest at the rate of 270% per annum."

On the same day the debtor signed a promissory note in the terms above stated.

Default having been made in the payment of the promissory note, the petitioning creditors, on January 2, 1930, issued a writ for 80*l.* the amount of the note due December 23, 1929, and 19*s.* for interest thereon between December 23, 1929, and January 2, 1930, at 48 per cent. per annum as provided by the note.

On February 11, 1930, the petitioning creditors obtained leave to sign judgment under Order XIV., r. 1, for the amount indorsed on the writ with interest, if any, and 10*l.* 11*s.* 6*d.* costs, the total amount of which was 95*l.* 12*s.* 8*d.*

On February 12, 1930, the petitioning creditors issued a bankruptcy notice against the debtor for 95*l.* 12*s.* 8*d.*

The debtor having failed to comply with the bankruptcy notice, the petitioning creditors on March 11, 1930, presented a petition for a receiving order against him, and on May 1, 1930, the Registrar made the order but stayed its advertisement pending an appeal.

At the hearing before the Registrar the debtor's solicitor offered to pay 61*l.* 10*s.* 6*d.* down in cash and interest at 5 per cent. up to the day of hearing, May 1, and to give a solicitor's undertaking that the taxed costs of the petition would be paid. This offer was refused by the petitioning creditors' solicitor on the ground that he was not satisfied that the money tendered was not the debtor's own money. The Registrar upheld the refusal.

The debtor appealed from the making of the receiving order. The appeal was heard on May 30, 1930.

R. A. Willes for the appellant. The bankruptcy notice upon which the act of bankruptcy alleged in the petition was founded is ex facie a bad notice in consequence of the provisions of s. 9 of the Moneylenders Act, 1927. It cannot be disputed that the notice served "required the debtor to pay the judgment debt in accordance with" the actual terms of the judgment, but the debt so recovered was "a debt due to a moneylender in respect of a loan made by him after the commencement" of the Moneylenders Act, 1927, and regard must be had to s. 9 of that Act. The intention and effect of the provisions of ss. 7, 9, and 10 of the Moneylenders Act, 1927, may, it is submitted, be summarized by saying that while a money-lender, subject to the provisions enabling harsh and unconscionable bargains to be reopened, may sue for and recover a debt including simple interest at any rate however excessive, if he wishes to obtain a judgment upon which he can serve a bankruptcy notice which can be made the foundation of an act of bankruptcy leading to the presentation of a petition, he must limit his claim (and consequently his judgment) to 5 per cent. interest on the money actually lent to the judgment debtor.

Sect. 9, sub-s. 1, of the Act provides that "interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition . . . . be calculated at a rate not exceeding five per cent. per annum," and it is therefore necessary to consider

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which "provisions of the Bankruptcy Act of 1914" do "relate to the presentation of a bankruptcy petition." It is submitted that ss. 3 and 4 of the Act are clearly included in the provisions so described, and that, in consequence of the provisions of s. 4, sub-s. 1 (*c*), there are also incorporated the provisions which define and relate to the commission of the act of bankruptcy which results from non-compliance with a bankruptcy notice. Now since a bankruptcy notice must "require payment in accordance with the terms of the judgment or order," no bankruptcy notice founded upon a judgment for the recovery of "a debt due to a money-lender" can satisfy the provisions of the Bankruptcy Act, 1914, and also those contained in s. 9 of the Moneylenders Act, 1927, if the interest claimed exceeds 5 per cent. It must not be forgotten that an act of bankruptcy resulting from non-compliance with a bankruptcy notice may be relied upon by any creditor of the judgment debtor, and (though this is now impossible by reason of r. 10, which has recently been added to Order III. of the Rules of the Supreme Court) in the present case there was nothing in the indorsement of the writ or in the judgment to indicate that the debt was a money-lender's debt. The petition did disclose that fact, because the petitioning creditors, who were the judgment creditors, claimed as the debt due to the petitioners only the amount of the principal advanced with 5 per cent. interest, indicating that they had a further claim to what was described as "postponed interest." The debtor offered to pay the amount claimed as the petitioning creditor's debt, and it is submitted in the circumstances a receiving order should not have been made.

W. N. Stable for the respondents.

[LORD HANWORTH M.R. On the technical point on the Moneylenders Act why should not the appellant have an opportunity of showing that he is solvent?]

Provided that the receiving order is not set aside the respondents have no objection to the debtor being allowed an opportunity of doing so.

[He was not further called upon.]

LORD HANWORTH M.R. This appeal raises an interesting point under the Moneylenders Act, 1927. The facts are these. [His Lordship stated the facts and continued:] By s. 9, sub-s. 1, of the Moneylenders Act, 1927, " Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement, and dividend, be calculated at a rate not exceeding five per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled." It is to be observed that under the last words of that sub-section the right of the money-lender to receive a higher rate of interest is preserved if all the debts have been paid in full, otherwise the right of the money-lender to excess interest is postponed.

But Mr. Willes says that these provisions take you back to the Bankruptcy Act, 1914, and to the jurisdiction to make a receiving order under s. 3 of that Act which, it should be observed, renders the jurisdiction to make a receiving order: " Subject to the conditions herein-after specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate." Mr. Willes says that the provisions relating to the presentation of a bankruptcy petition include the provisions as to the service of a bankruptcy notice, non-compliance with which is an act of bankruptcy. The conditions for the making of a receiving order include the obtaining of a judgment and the like, hence he contends that there is an implied prohibition in s. 9 of the Act of 1927 against the inclusion of a claim for interest at a higher rate than 5 per cent. in a bankruptcy notice founded on a judgment for the recovery of a debt due to a money-lender, such judgment and the

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notice founded on it being steps leading up to the presentation of a petition. Here it is said that the writ asked for interest at the rate of 270 per cent. and therefore that there has been a disobedience of s. 9, which only allows interest at the rate of 5 per cent. and no more to be claimed by the money-lender if the resultant judgment is to be followed by a bankruptcy notice leading to the presentation of a bankruptcy petition. Attention is also drawn to s. 7 of the Act of 1927 which, it is said, prohibits the charge of compound interest, and as interest is being charged on the interest unpaid when the bill was not met in due course there is thus a contract to pay compound interest. But the proviso enables the money-lenders to do precisely what they did, therefore I do not think s. 7 avails the debtor. It comes, therefore, back to s. 9. In that section there is a reference to the provisions of the Bankruptcy Act, 1914, but the section does not introduce or refer to all the provisions of that Act. It particularizes certain provisions relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement and dividend. Not all the steps leading up to a bankruptcy are included in s. 9, and we have to see whether the provisions of the Bankruptcy Act are restricted by the words of particularity in the section. The words of s. 9 are plain, specifying as they do certain steps in a bankruptcy, and it is impossible to read the section as if all the provisions for a bankruptcy were introduced. Therefore the technical point argued for the appellant fails. Equally so does the appeal fail on the decision of the question of fact by the Registrar.

Then Mr. Willes said that, as the debtor is now ready before the advertisement of the receiving order to show that he is able to pay all his debts in full, the receiving order is unnecessary and ought not to have been made. We think it would be wrong to set aside the receiving order, but that it would be fair to allow the debtor to proceed under s. 108 of the Bankruptcy Act, 1914, to ask for rescission of the receiving order. This can safely be done by sending the case back to the Registrar to enable the debtor to make an application under s. 108 and staying the advertisements for a sufficient time to give him that opportunity. Subject to that opportunity being given to the debtor, the appeal will be dismissed.

LAWRENCE L.J. I agree.

ROMER L.J. I agree.

Appeal dismissed.

Solicitor for appellant: *F. Wilson Foley.*
Solicitor for respondents: *M. A. Jacobs.*

W. I. C.

GRANT *v.* EDMONDSON.

[1929. G. 228.]

CLAUSON J.
1930
April 2, 3, 16.

Rentcharge—Absence of Words of Inheritance in Limitation—Intention to create Perpetual Rentcharge—Direct Reference to Limitations exhausting the Fee Simple—Collateral Covenant to pay—Benefit of Covenant not running with Rentcharge.

Notwithstanding the dictum of Holt C.J. in *Brewster* v. *Kidgill* (1697) 12 Mod. 166, it is a generally recognized legal doctrine that the benefit of a covenant to pay a rentcharge does not run with the rentcharge at law and that such a covenant is only collateral or in gross.

The doctrine is not confined to cases where the rentcharge created issues out of the estate of the feoffor of the land, but applies as well to cases where it issues out of the estate of the feoffee.

By deed dated April 26, 1867, the Earl of Wilton, the tenant for life of the Wilton estates, in exercise of certain powers under a private Act, conveyed part of the settled lands to E. in fee simple; and E. granted thereout to the Earl and the person or persons who would for the time being have been entitled to the receipt of the rents and profits thereof if the conveyance had not been made, yearly and for every year for ever thereafter the rent of 142*l.* 7*s.* 3*d.* There were the usual powers of distress and entry and a covenant by the grantee with the Earl his heirs and assigns and other the person or persons who would for the time being have been entitled as aforesaid that he, the grantee, should pay the yearly rent thereby reserved to the person or persons entitled thereto under the reservation thereinbefore contained.

The Earl died in 1882, and under and by virtue of various deaths and two successive disentailing deeds and resettlements the Wilton estates passed ultimately to the present infant tenant in tail and became vested in the plaintiffs as statutory owners thereof. In none of those title deeds was there an express assignment of the benefit of the covenant to pay the rentcharge.

E. died in 1887, leaving a will of which the first defendant was executor, the other defendants being the present trustees thereof. In 1920 the trustees sold and conveyed the land conveyed to their testator in 1867 to W. in fee simple, subject to the rentcharge and to the covenants on the part of the grantee contained in the conveyance of 1867. In 1927 W. became bankrupt, and by an order of August 8, 1929, the bankrupt's interest therein was vested in the plaintiffs in fee simple.

Payments of the rentcharge having ceased to be made since December 25, 1927, the plaintiffs brought this action for payment by the defendants of 231*l*., the arrears which accrued down to the date when the land was vested in them.

The questions were: (1.) whether the deed of 1867 effectually limited the rentcharge in perpetuity; and (2.) whether the benefit of the covenant ran with the rentcharge at law, to enable the plaintiffs to recover the arrears from the defendants on their testator's covenant:—

Held, first, that notwithstanding the absence of express words of inheritance in the limitation of the rentcharge to the Earl in the deed of 1867, there were sufficient words of reference from which limitations could be gathered which exhausted the fee simple and that a perpetual rentcharge had been effectually created.

Secondly, that the benefit of the covenant did not run with the rentcharge at law, but was only a covenant collateral or in gross.

Thirdly, that, as s. 5 of the Real Property Act, 1845, and s. 56 of the Law of Property Act, 1925, refer only to covenants which run with the land or the rentcharge, those statutory provisions did not affect the second question.

The action therefore was dismissed. (1)

ACTION.

By deed dated April 26, 1867, and made between the Right Hon. Thomas Earl of Wilton of the one part and John Beeby Edmondson of the other part in consideration of the yearly rent and the covenants on the part of John B. Edmondson thereinafter respectively reserved and contained the Earl, being tenant for life of the Wilton settled estates, which included a plot of land at Crumsal in the county of Lancaster, in exercise of certain powers under a private Act (7 Will. 4 and 1 Vict. c. 37), conveyed the said plot of land to John B. Edmondson in fee simple and John B. Edmondson by the same deed granted out of the plot to "the said Earl and the person or persons who would for the time being have been entitled to the receipt of the rents and profits of the said plot, if the conveyance had not been made and executed yearly and for every year for ever thereafter the rent or yearly sum of 142*l*. 7*s*. 3*d*. by equal half-yearly payments." The conveyance contained powers of distress and entry in the usual form and the following covenant: "And the said grantee doth hereby for himself his heirs executors administrators and assigns covenant with the said Earl his heirs and assigns and other the person or persons who would for the time being have been entitled as aforesaid that he the grantee his heirs and assigns shall from time to time and at all times hereafter . . . . pay or cause to be paid the yearly rent hereby reserved to the person or persons entitled thereto under the reservation thereinbefore contained."

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(1) Affirmed in C. A. [1930] W. N. 211.

The Earl died in 1882, and under and by virtue of various deaths and two successive disentailing deeds and resettlements, the Wilton estates passed ultimately under the will of the sixth Earl, who died in the year 1927, to the seventh Earl, the present tenant in tail, who was born in the year 1921, and became vested in the plaintiffs in the action, as statutory owners thereof, the plaintiffs being in fact the representatives of the sixth Earl under a probate of his will limited to the settled estates. In none of the title deeds was there an express assignment of the benefit of the covenant to pay the rentcharge.

John B. Edmondson died on May 4, 1887, leaving a will of which the first defendant Thomas John Edmondson was executor, the other defendants being the present trustees of the will, who admitted that they had in their hands some assets forming part of their testator's estate. In the year 1920, those trustees of John B. Edmondson's will sold the plot of land in question to Arnold Williams and conveyed it to him in fee simple subject to the payment of the yearly rentcharge and to the observance and performance of the covenants on the part of John B. Edmondson and the conditions contained in the conveyance of April 26, 1867. The conveyance to Arnold Williams contained a covenant by him his heirs and assigns with the trustees to pay the yearly rent and to observe and perform those covenants and conditions and to indemnify the trustees against non-payment of the rent or breach of any of those covenants. In the year 1927, Arnold Williams was adjudicated bankrupt and, his trustee having disclaimed all interest in the plot of land, by an order made on August 8, 1929, the bankrupt's interest therein was, subject to the rentcharge, vested in the plaintiffs in fee simple.

The rentcharge was paid down to December 25, 1927.

In the action the plaintiffs claimed (1.) a declaration that, as statutory owners of the Wilton estates, which included the rentcharge under the deed of April 26, 1867, they were entitled to recover from the defendants as trustees or, in the alternative from the defendant Thomas John Edmondson as executor of the will of John B. Edmondson deceased the sum of 231*l.* being the arrears of rentcharge which accrued down to the date when the plot of land was vested in them, and (2.) payment of those arrears. The defendants denied that the plaintiffs were entitled to the benefit of the covenant in the deed of April 26, 1867, and pleaded that it was a covenant in gross with the Earl personally and did not run with the rentcharge, so as to be enforceable by the plaintiffs, and further, that the charge merged in the inheritance of the land, which by force of the order of August 8, 1929, became vested in the plaintiffs.

At the trial of the action the point was raised for the first time whether by the deed of April 26, 1867, the rentcharge was effectually vested in the Earl for an estate in fee simple or whether, owing to the absence of strict words of inheritance, the Earl was entitled only to a life estate. It was then agreed, for the convenience of procedure, that the question should be first argued whether the plaintiffs as successors in title of the Earl, the original grantee of the rentcharge, could sue the defendants on their testator's covenant in the deed of April 26, 1867, and argued upon the assumption that the rentcharge had been granted to the Earl in fee simple.

Cleveland-Stevens K.C. and *J. T. Edgerley* for the plaintiffs. The plaintiffs have rights under the covenant in the deed of conveyance of 1867 which they can enforce. The benefit of the covenant runs with such an incorporeal hereditament as this rentcharge: see dictum of Holt C.J. in *Brewster* v. *Kidgill* (1), where he says: "I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." That opinion was approved of by Lord St. Leonards: see Sugden on Vendors and Purchasers, 14th ed., p. 591: pl. 37 II. n. "The rentcharge is an incorporeal hereditament, and issues out of the land, and the land is bound by it; the covenant, therefore, may well run with the rent in the hands of an assignee." That dictum of Holt C.J. was referred to by Fry L.J. apparently with approval in *Austerberry* v. *Corporation of Oldham.* (2) The burthen of a covenant by the lessee of incorporeal hereditaments—namely, tithes, entered into by him for the preservation of the tithes—has been held to run with the tithes, so as to bind the assignee of the lease: *Bally* v. *Wells.* (3)

Sir Thomas Hughes K.C. and *Beebee* for the defendants. The covenant is a personal covenant and does not run with the rentcharge so as to entitle the plaintiffs as assigns of the rentcharge to the benefit of the covenant. The statement by Holt C.J. in *Brewster* v. *Kidgill* (4) relied upon by the plaintiffs is only a dictum and was not necessary to the decision in that case. It was treated by Lord Ellenborough C.J. in *Milnes* v. *Branch* (5) as extra-judicial. In that case lands were conveyed to grantees in fee to the use that the feoffor his heirs and assigns should receive a rentcharge out of the estate of the feoffor and subject thereto to the use of the grantees in fee; and the grantees covenanted with the feoffor his heirs and assigns to pay the rent; Held, that the assignee of the rent could not sue on the covenant for non-payment of the rent, as the covenant was personal to the feoffor, and the benefit of it did not run with the rentcharge. The statute 32 Hen. 8, c. 34, does not apply in the absence of privity of either contract or estate. In 1836, it was held in *Kennedy* v. *Stewart* (6) that the benefit of a covenant to

(1) (1697) 12 Mod. 166, 170.
(2) (1885) 29 Ch. D. 750, 785.
(3) (1769) Wilm. N. 341.
(4) 12 Mod. 166.
(5) (1816) 5 M. & S. 411.
(6) (1836) 7 I. L. R. 421*n*.

pay a rentcharge does not run with the rent to an assignee of the rentcharge, and the dictum of Holt C.J. was there treated as of no authority. In *Randall* v. *Rigby* (1) *Milnes* v. *Branch* (2) was treated as an authority that a covenant collateral or in gross will not run with a rentcharge. An annuity was charged on land in the hands of one person and another covenanted to pay it. The covenantor was not liable to pay unless the terre-tenant refused: he was therefore not liable in debt and the action being founded on debt failed on demurrer. After the abolition of the real action, an action of debt against terre-tenant might be maintained by the grantee of a rentcharge in fee: *Thomas* v. *Sylvester*. (3) In *Butler* v. *Archer* (4) [*Milnes* v. *Branch* (2) is referred to as having decided that a covenant does not run with a fee farm rent; and the majority of the Court took Lord Ellenborough's view expressed in that case that the covenant was merely a personal one and did not run with the rent. In *Haywood* v. *Brunswick Building Society* (5), which was recognized by Clauson J. in *Torbay Hotel, Ld.* v. *Jenkins* (6) as deciding that the benefit of a covenant with a vendor who reserves a rentcharge issuing out of the land sold does not run at law with the rentcharge, Brett L.J. recognized *Milnes* v. *Branch* (2) as sound law and said that Lord St. Leonards understood its effect to be that a covenant to build did not run with the rent in the hands of an assignee: Sugden on Vendors and Purchasers (1862) 14th ed., p. 591, and Lindley L.J. did not disapprove: see also notes to *Spencer's Case*, Sm. L. C. (1929), 13th ed., p. 98; Pollock on Contracts, 9th ed. (1921), p. 254; Halsbury's Laws of England, vol. xxiv., p. 517, para. 1021; and 1 Wms. Saund., p. 302, note (*e*). *Austerberry* v. *Corporation of Oldham* (7) shows that the covenant the benefit of which is being claimed must relate to the land of the covenantee: per Cotton and Fry L.JJ. (8)

(1) (1838) 4 M. & W. 130.
(2) (1816) 5 M. & S. 411.
(3) (1873) L. R. 8 Q. B. 368.
(4) (1860) 12 Ir. C. L. R. 104.
(5) (1881) 8 Q. B. D. 403.
(6) [1927] 2 Ch. 225, 239.
(7) (1885) 29 Ch. D. 750, 785.
(8) 29 Ch. D. 750, 776, 784.

Before 1845, a covenant in a deed by C., who executed the deed, with B., whose attorney A. (authorized by B. in writing to execute the deed for B.) executed the deed in his own name, was held not to be enforceable by B.: *Berkeley* v. *Hardy* (1) and, although by s. 5 of the Real Property Act, 1845, a person not named in an indenture executed after October 1, 1845, could take the benefit of a covenant relating to land, yet that Act did not enable a person who was not in existence at the time to sue on the covenant: *Kelsey* v. *Dodd*. (2) Here, unless the covenant runs with the rentcharge, it is doubtful whether s. 5 assists the plaintiffs: see per Lord Macnaghten in *Dyson* v. *Forster* (3): and s. 56 of Law of Property Act, 1925, took the matter no farther.

Even if the benefit of the covenant does run with the rentcharge the plaintiffs have no title to the rentcharge, in the absence of any words of inheritance in the limitation of it to the Earl in the deed of 1867.

Cleveland-Stevens K.C. and *J. T. Edgerley* for the plaintiffs. Although there are no express words of inheritance in the limitation of the rentcharge to the Earl, it is permissible to show, upon the proper construction of the deed of grant of 1867, an intention to make the rentcharge a perpetual one. That deed contains words of reference sufficient to prove such an intention and to supply words of inheritance: Prideaux's Precedents in Conveyancing, 21st ed., p. 589. By the deed the rentcharge is granted to the Earl and to the persons entitled in succession to the Wilton settled estates: *Gwyn* v. *Neath Canal Navigation Co.* (4); Norton on Deeds, 2nd ed., p. 94. Words of inheritance have been supplied from powers of distress and entry: *Vernon* v. *Gatacre*. (5) The effect of s. 4 of the private Act (1 Vict. c. 37) (6) is to limit the rentcharge to the Earl and his heirs.

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(1) (1826) 5 B. & C. 355.

(2) (1881) 52 L. J. (Ch.) 34.

(3) [1909] A. C. 98, 102.

(4) (1868) L. R. 3 Ex. 209.

(5) (1566) 3 Dy. 253*a*.

(6) Sect. 4: "Provided nevertheless that when any of the said messuages, lands and hereditaments shall be conveyed in fee in pursuance of this Act, all and every the rent and rents to be reserved or made payable upon or in respect of such conveyance

The covenant to pay the rent to the Earl his heirs and assigns amounts to a grant of the rentcharge to the Earl in perpetuity: per Lindley L.J., *Austerberry* v. *Corporation of Oldham.* (1)

In reply to the argument on the first question: the covenant is not a mere collateral covenant; but it affects the nature and value of the rentcharge and runs with it for the benefit of the plaintiffs: per Lord Macnaghten in *Dyson* v. *Forster.* (2) And the benefit runs with an incorporeal hereditament, as is this rentcharge: Sugden on Vendors and Purchasers, 14th ed., p. 577; *Bally* v. *Wells.* (3) The rentcharge issuing out of the land is an incorporeal hereditament and a "tenement," and the statute 32 Hen. 8, c. 34, in express terms refers to incorporeal hereditaments and tenements. If the Earl had an estate of inheritance in the rentcharge, the plaintiffs as assignees of the reversion are entitled to sue upon the covenant to pay the rent for a breach: *Martyn* v. *Williams* (4); *Norval* v. *Pascoe* (5); *Crompton* v. *Jarratt.* (6) The present case is distinguishable from *Milnes* v. *Branch* (7), because here the rentcharge was created out of the estate of the grantee of the land, the covenantor: Sugden on Vendors and Purchasers, 14th ed., p. 590, para. 34. The covenant runs with the rentcharge for the benefit of the Earl's assigns: s. 5 of the Real Property Act, 1845; *Dyson* v.

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or conveyances in fee respectively shall go and be payable to the person and persons who would for the time being have been entitled to the receipt of the rents and profits of the hereditaments so conveyed, if such conveyances had not been executed, and the same rents respectively shall from and after the creation thereof stand limited to such or the like uses upon and for such or the like trusts, intents and purposes and under and subject to such or the like powers, provisoes, conditions charges and limitations as the said messuages, lands and hereditaments to be so conveyed as aforesaid and out of which such rents respectively shall be issuing would have stood limited under and by virtue of the said wills codicils and indentures of settlement and appointment respectively, if such conveyance or conveyances in fee thereof had not been made or as near thereto as the rules of law and equity and the deaths of persons and other contingencies will admit . . . ."

(1) 29 Ch. D. 750, 781.
(2) [1909] A. C. 98, 102.
(3) Wilm. N. 341.
(4) (1857) 1 H. & N. 817, 829.
(5) (1864) 34 L. J. (Ch.) 82.
(6) (1885) 30 Ch. D. 298, 314.
(7) 5 M. & S. 411.

Forster. (1) Even if the covenant does not run with the rentcharge the plaintiffs are entitled to the benefit of it by force of s. 56 of the Law of Property Act, 1925, which takes the place of s. 5 of the Real Property Act, 1845, as Lord Macnaghten in *Dyson* v. *Forster* (1) doubted whether s. 5 was confined to cases where the covenant was one which ran with the land. Here the covenant is in respect of an incorporeal hereditament and is beneficial only to the owners of the rentcharge.

Sir Thomas Hughes K.C. in reply. Proper words of limitation are necessary to give the Earl a fee simple estate in the rentcharge. The words used in the private Act are not sufficient to give the Earl the fee simple. In *Gwyn* v. *Neath Canal Navigation Co.* (2) the defendants were estopped by deed from denying that the rentcharge was vested in the Earl of Jersey and was evidence of a valid grant.

Cur. adv. vult.

April 16. CLAUSON J. [after stating the facts, continued as follows:] In this action the plaintiffs sue the defendants for 231*l.* 1*s.* 10*d.* being the arrears of rentcharge down to the date when the fee simple of the plot became vested in the plaintiffs. The plaintiffs not having exercised their rights of distress and entry prior to the date when the plot became vested in them, and the bankruptcy having interfered with the efficacy of any remedy for arrears which might have been available against Williams, the plaintiffs have obviously no practicable means of recovering the arrears in question, unless they can succeed in recovering them from J. B. Edmondson's estate by virtue of Edmondson's covenant in the deed of April 26, 1867. Before me two questions were argued, and it is common ground that unless the plaintiffs succeed on both the questions this action must fail.

The first question is whether the deed of April 26, 1867, effectually limits a perpetual rentcharge. It is clear that the second Earl of Wilton could not take more than a life

(1) [1909] A. C. 98, 102.

(2) L. R. 3 Ex. 209.

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interest in the rentcharge under the limitation of the rentcharge to him, since there are no words of inheritance; but I conceive that words of inheritance are not essential to the creation of a perpetual rentcharge, if the intention to create it as a perpetual rentcharge is clearly expressed, and there are words of direct and immediate reference (see Challis, Real Property, 3rd ed., p. 222; and Co. Litt. 9*b*), from which limitations can be gathered which exhaust the fee simple in the rentcharge. On a careful consideration of the words in the present grant, and assuming (as is admittedly the fact) that the land immediately before the grant was held by the second Earl of Wilton for life with various remainders which could, if necessary, have been written out at length from the documents of title, and if so written out would have exhausted the fee simple, it appears to me to be sufficiently clear that the rentcharge is well created in fee simple. I have, however, assistance in coming to this conclusion from the views of Kelly C.B. and Barons Martin Bramwell and Channell in *Gwyn* v. *Neath Canal Navigation Co.* (1) From that report it appears, I think, that if the words "in case the said instrument or deed poll had not been made" had stood in the operative part of the deed poll of 1801 (in which case the words would have corresponded closely in all material respects to those in the deed which I have to construe) the judges named would have felt no difficulty in holding the rentcharge well created.

The second question is whether the plaintiffs, as successors in title to the grantees of the rentcharge, can sue the defendants on their testator's covenant to pay the rentcharge. In technical language, the question is whether the benefit of the covenant runs with the rentcharge at law. For many years the general opinion of legal practitioners, as reflected in the ordinary text-books, has regarded as sound the doctrine that the benefit of a covenant (for example, for payment of the rentcharge) cannot run with a rentcharge at law, but the covenant must be treated as a covenant collateral or in gross: see 1 Wms. Saund., p. 303; Burton's Compendium, 7th ed., p. 347; Halsbury's Laws of England, vol. xxiv., para. 1021, pp. 517, 518; Pollock on Contracts, 9th ed., p. 254. The doctrine is perhaps traceable (see Holdsworth, History of English Law, 3rd ed., vol. iii., p. 165) to the principle that a thing incorporeal cannot be appendant to a thing incorporeal (Co. Litt. 121*a*). The impossibility of a covenant running with a rentcharge must, however, be treated as modified to this extent, that since 32 Hen. 8, c. 34, makes certain covenants as between lessor and lessee run not only with corporeal hereditaments, but also incorporeal hereditaments, such covenants may run with an incorporeal hereditament (for example, with tithe, see *Bally* v. *Wells* (1), or with a right to take minerals: see *Martyn* v. *Williams* (2)) as between lessor and lessee of the incorporeal hereditament and their respective assigns. This exception appears however to be due to the operation of the Act and to subsist only in relation to rights arising from leases of incorporeal hereditaments; and the cases just mentioned, which recognize the exception which I have stated, do not seem to be in any way inconsistent with the doctrine that, in cases other than those excepted, the benefit of a covenant cannot run with a rentcharge.

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(1) L. R. 3 Ex. 209.

It is true that Holt C.J. in *Brewster* v. *Kidgill* (3) expressed by way of dictum, an opinion that the benefit of a covenant to pay a rentcharge ran with the rentcharge; but this opinion was regarded by Lord Ellenborough C.J. in the year 1816 (see *Milnes* v. *Branch* (4)) to be extra-judicial; and although Lord St. Leonards in his treatise on Vendors and Purchasers, 14th ed., p. 591, expressed the opinion that "there appears to be no foundation for shaking Holt's opinion," Lord Ellenborough C.J., in the case last cited, seems to recognize the validity of the doctrine I have stated, and Crampton J. in the King's Bench Division in Ireland in the year 1836 in *Kennedy* v. *Stewart* (5) seems to take the same view, expressly treating the dictum of Holt C.J. as without authority. Abinger C.B. and Parke B. in *Randall* v. *Rigby* (6) seem also to take the same view of the collateral nature of

(1) Wilm. N. 341.

(2) (1857) 1 H. & N. 817.

(3) 12 Mod. 166.

(4) 5 M. & S. 411, 417.

(5) 7 Ir. L. R. 421*n*.

(6) 4 M. & W. 130.

the covenant. In the year 1860 in *Butler* v. *Archer* (1) in the Queen's Bench in Ireland, Lefroy C.J. and Hayes J. recognized the doctrine as sound, and although O'Brien and Fitzgerald JJ. dissented from the judgment of the other two judges by reason of certain Irish statutes which they thought applicable, I cannot find that they questioned the soundness of the doctrine. Even if the matter stopped there, it would be difficult for me to adopt the dictum of Holt C.J. and the opinion of Lord St. Leonards in his text-book, in face of the decisions I have cited, and the general opinion of practitioners. But in the year 1881 the Court of Appeal in *Haywood* v. *Brunswick Building Society* (2) expressed the view that the benefit of a covenant to build did not run with a rentcharge at law. In that case the rentcharge was created by a grant by the original owner of the land to the use that the rentcharge should be paid to himself, while in the case before me the rentcharge is granted, in effect, to the original owner by the grantee of the land; but although it is true that Bayley J. in *Milnes* v. *Branch* (3) adverts particularly to the fact that the rent arose out of the estate of the feoffor of the land and not of the feoffee, I can see no principle which entitles me to confine the doctrine which I have stated to the case where the rentcharge is created out of the feoffor's estate. It was suggested that I must treat a passage in the judgment of Fry L.J. in *Austerberry* v. *Corporation of Oldham* (4) as an adoption by him of Holt C.J.'s dictum as correct; but this suggestion seems to me to be erroneous. True it is that the Lord Justice read the whole of Holt C.J.'s sentence; but his attention was directed to, and he was concerned only with, the latter part of the sentence, which laid down the indubitably correct statement that the burden of a covenant to pay a rentcharge does not run at law with the land out of which the rentcharge issues, and it seems to me quite clear that he expressed no view at all in regard to the running of the benefit of the covenant with the rentcharge.

(1) 12 Ir. C. L. R. 104.
(2) 8 Q. B. D. 403.
(3) 5 M. & S. 411, 417.
(4) 29 Ch. D. 750, 785.

The result appears to me to be that whatever arguments might be based on the dictum of Holt C.J. and on Lord St. Leonards' opinion in some higher Court, it would be wrong for a judge of first instance to throw any doubt on the correctness of the view accepted by the general opinion of the profession for so many years past that the benefit of a covenant to pay a rentcharge does not run with the rentcharge.

It was pointed out in argument that in the case of *Gwyn* v. *Neath Canal Navigation Co.* (1), cited above, an assign of the rentcharge was suing on a covenant for payment, and it was suggested that that case involved the proposition that such an assign could sue on the covenant. It is perhaps not quite clear that the action was on the covenant, though it must I think be taken that it was so; but even if the point was open, it was not in fact taken, and no decision is pronounced upon it, and I venture to conjecture that the reason why it was not taken was that the defendants, being terre-tenants, were in any case liable in debt: see *Thomas* v. *Sylvester.* (2) The truth is that the only question in dispute arose from the ill drafting of the deed, and that was the only question adjudicated. The defendants' liability in a proper form of action, apart from the point on the wording of the deed, was not and could not be in dispute. It is interesting, and not without significance, that Mr. Bowen, who was counsel for the defendants in *Gwyn* v. *Neath Canal Navigation Co.* (1), five years later successfully argued *Thomas* v. *Sylvester* (2) for the plaintiffs and thus obtained a clear decision that the terre-tenants would in such a case be liable in debt.

A further point remains. It was suggested that the effect of s. 5 of the Law of Property Amendment Act, 1845 (see now s. 56 of the Law of Property Act, 1925), was to give the plaintiffs some right of action which they would not otherwise have possessed. It must, however, be borne in mind that a covenant cannot be entered into with a person not in existence (see *Kelsey* v. *Dodd* (3)): and that I am bound by the decision of the Appeal Court in *Forster* v. *Elvet*

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(1) L. R. 3 Ex. 209. (2) L. R. 8 Q. B. 368.
(3) 52 L. J. (Ch.) 34, 39.

Colliery Co. (1) (notwithstanding any dictum which can be found in the speeches of the learned Lords in the same case in the House of Lords (2) (under the title of *Dyson* v. *Forster*)) to hold that s. 5 of the Act of 1845 refers only to covenants which run with the land, and accordingly that s. 56 of the Act of 1925 refers only to covenants which run with the land or (applying the words "hereditaments" in the Act of 1845 and "land or other property" in the 1925 Act to the rentcharge with which I am dealing) with the rentcharge. It seems to follow that if I am right in the view that the covenant here in question does not run with the rentcharge, these statutory provisions carry the matter no further.

It is convenient that I should record two matters. First: it was agreed that in the chain of the title to the Wilton estates from 1867 to the present day, in which the rentcharge is throughout treated as parcel of the estates, there is no express transfer of the benefit of Edmondson's covenant. The question whether if there had been such a transfer the legal position would have been different, was not discussed, and I express no opinion upon it. Secondly, the covenant having been given in 1867, there was no discussion of the question whether anything contained in the Conveyancing Act, 1881, or the Law of Property Act, 1925, would affect the legal position in regard to similar covenants entered into after the coming into force of those Acts respectively, and my judgment must not be read as in any way prejudging any such question.

Since the plaintiffs fail on the second point, though succeeding on the first, the action must be dismissed and the plaintiffs must pay the costs.

Solicitors: *Grover, Humphreys & Boyes; Hatchett Jones & Co., for Withington, Petty & Boutflower, Manchester.*

(1) [1908] 1 K. B. 629.
(2) [1909] A. C. 98.

H. C. H.

In re ASKEW.

MARJORIBANKS *v.* ASKEW.

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1930
May 8, 30.

[1929. A. 2106.]

Conflict of Laws—Legitimation Abroad of Child of British Subject with foreign Domicil—Rights in English Law acquired by virtue of Parent's foreign Domicil—Lex domicilii—Recognition in English Courts—Renvoi recognized in English Courts only when treated by foreign Law as Part of Lex domicilii—Legitimacy Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-s.* 2 ; *s.* 8.

By an English settlement made upon the marriage of a husband domiciled in England with his first wife a fund called the husband's trust fund was settled upon trust during the husband's life to apply the income for the benefit of him and the first wife and the issue of the marriage as therein mentioned, and after the death of the husband and the first wife upon trusts for the issue of the marriage. The settlement provided that should the husband marry again he might by deed or will revoke the provisions contained in the settlement concerning a part of the husband's trust fund, and might appoint the same upon trusts for the benefit of any wife who might survive him and of any child of that marriage. There were two children of the first marriage. The husband separated from the first wife, and acquired a German domicil before 1911, in which year the proper Court in Germany having jurisdiction in the matter dissolved the marriage. In April, 1912, the husband married a second wife in Berlin. On January 30, 1911, a daughter had been born in Switzerland to the second wife, and she was acknowledged to be the husband's daughter. The divorce was made final in July, 1911. By a deed poll dated June 13, 1913, the husband purported to revoke the trusts relating to a part of the husband's trust fund under the settlement, and to appoint the income upon trust after his death to be paid to the second wife, and after her death upon trusts for the children of the second marriage. He died in 1929; and the trustees of the settlement took out a summons asking for the opinion of the Court whether the power of appointment over the trust fund had been validly and effectively exercised by the deed of 1913:—

Held, (i.) that, in matters coming before English Courts and depending on foreign domicil, the lex domicilii, in the widest sense, must prima facie apply:

(ii.) that, upon the evidence, the daughter had acquired the status of legitimacy in Germany, and that, since the lex domicilii must prima facie prevail, she must be treated in an English Court as a legitimate child of the husband, with the result that the power of appointment must be held to have been validly exercised.

Casdagli v. *Casdagli* [1919] A. C. 145 and *In re Ross* [1930] 1 Ch. 377 followed.

In re Johnson [1903] 1 Ch. 821 dissented from.

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ASKEW, *In re.*

MARJORIBANKS *v.* ASKEW.

Udny v. *Udny* (1869) L. R. 1 H. L. Sc. 441 and *In re Annesley* [1926] Ch. 692 considered.

Observations on the difficulties caused by the conflict of the Anglo-American doctrine that personal law is determined by the domicil of the *de cujus* with the modern Continental doctrine that it is determined by national allegiance.

SUMMONS.

The following statement of facts is taken substantially from his Lordship's considered judgment :—

The question to be decided upon this summons is whether, upon the true construction of a settlement of June 30, 1893, and in the events which have happened, the power of appointment over part of "the husband's trust fund" thereby constituted conferred upon John Bertram Askew (now deceased) was validly and effectively exercised by a deed poll dated June 13, 1913. This question depends upon the view that should be taken as to the marriage in Germany of the defendant Anna Askew with the said John Bertram Askew as effecting the legitimation of the defendant Margarete Askew, an infant, who was born previously to the marriage and before the date of a divorce according to German law.

By the settlement of June 30, 1893, the fund which I may shortly describe as "the husband's trust fund" was settled upon the occasion of the marriage of John Bertram Askew with Frederica Louisa Dallas upon trust during the life of John Bertram Askew to apply the income for the benefit of him and Frederica Louisa his wife and the issue of their marriage as therein mentioned and after the death of the husband and the wife upon trusts for the issue of the marriage. By clause 16 of the settlement, it was in effect provided that, if John Bertram Askew should marry again, he might by deed or will revoke the trusts, powers and provisions therein-before contained concerning any part of the husband's trust fund not exceeding one-half thereof, and might appoint the part to which such revocation should extend after his death to be held upon such trusts and subject to such powers and provisions for the benefit of any wife who might survive him or any child or other issue of such subsequent marriage as he might think proper, but so that any wife who should survive him should not take more than a life interest, and provided that an only child or any two or more children and any issue of a child or children collectively of the husband by a subsequent marriage should not under an exercise of the power become entitled to a larger share of the husband's trust fund than such only child or such children collectively would have taken in case the husband's trust fund had been equally divided between all the children of the husband by every marriage who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry.

There were issue of the marriage between John Bertram Askew and Frederica Louisa Askew two children who are defendants to the present application. For some years before 1912 John Bertram Askew and his then wife had been separated, he living in Germany and she living with the two children of the marriage in Switzerland. John Bertram Askew admittedly acquired a de facto German domicil prior to 1911.

In 1911 John Bertram Askew instituted proceedings in the proper Court in Germany having jurisdiction in the matter for a divorce from Frederica Louisa his wife; and in the month of June, 1911, such Court duly made its decree dissolving the marriage with the said Frederica Louisa Askew; and such decree in due course became absolute.

On April 20, 1912, after the first marriage had been absolutely dissolved, John Bertram Askew married the defendant Anna Askew in Berlin. The defendant Margarete Askew was, however, born in Switzerland on January 30, 1911, to the defendant Anna Askew, who had been living with John Bertram Askew since December, 1909, and she was acknowledged to be the daughter of John Bertram Askew. By deed poll dated June 13, 1913, John Bertram Askew purported to revoke the trusts relating to a part of the husband's trust fund under the said settlement, and to appoint the income of all the part of the husband's trust fund to which the revocation should extend from and after his death upon trust to pay the income to Anna Askew for life if she should survive him and from and after the death of the survivor of him and the said Anna Askew upon trust (in the events which have happened) for the defendant Margarete Askew absolutely, on her attaining twenty-one or marriage.

John Bertram Askew died at Moscow on February 5, 1929, his first wife having previously died—namely, on October 1, 1918: and this summons was taken out by Sir George John Marjoribanks and Mr. David Hugh Watson Askew, the trustees for the time being of the settlement of 1893, for the determination of the question whether, upon the true construction of the settlement and in the events which had happened, the power of appointment over part of the husband's trust fund conferred upon John Bertram Askew was validly and effectively exercised in favour of the defendants Anna Askew and Margarete Askew or either of them by the deed poll of June 13, 1913.

C. V. Rawlence for the trustees.

H. S. G. Buckmaster for children of the first marriage. It is not disputed that the second wife is a "second wife" within the meaning of the trusts of the settlement. Part of the evidence as to the status of Margarete Askew is based on the supposition that English law refers the question back to the law of the domicil. The English Court will decide the matter upon the basis of German law—namely, that the position of the child is decided by English law: *In re Ross.* (1) The principle is that the English Court takes the same view as the foreign Court would take in a particular case. The foreign Court inquires what the English law is. *In re Ross* (1) does not support the argument that the Court must consider itself as sitting as a German Court in deciding the child's status. Municipal law would be applied by the country in which the person was a national: *Casdagli* v. *Casdagli.* (2) The status depends on the Court's view as to the extent to which English law must be applied in deciding

(1) [1930] 1 Ch. 377.

(2) [1918] P. 89, 110; [1919] A. C. 145.

status. English municipal law applies, and the child is therefore illegitimate and cannot take.

R. F. Roxburgh for the second wife and the daughter. The authority to be followed is *In re Grove.* (1) What has to be determined is whether Germany is a country allowing legitimation by subsequent marriage in the circumstances of the case. If that is so, it may mean that it allows it in the case of its own nationals, or that it allows it having regard to the fact that the father is a British subject with a German domicil.

Cur. adv. vult.

May 30. MAUGHAM J. [having stated the facts as set out above :] There is no doubt that, if German local law were applicable, the subsequent marriage of the parents of the defendant Margarete Askew would effect her legitimation, and that although she was born before the divorce, which was not made absolute until July 27, 1911. The trustees are naturally desirous of the protection of the Court in relation to the question whether the power of appointment in question was validly exercised by the deed poll, and for this purpose it is necessary to determine whether the defendant Margarete Askew, though born out of wedlock during the continuance of a previous marriage, is, having regard to her father's domicil, legitimate. It is admitted that the Legitimacy Act, 1926, would not have had that effect, having regard to the fact that John Bertram Askew was married to his first wife when the defendant Margarete Askew was born.

The question of legitimation of a child by the subsequent marriage of its parents in a foreign country (apart from the provisions of the Legitimacy Act, 1926, s. 1, sub-s. 2, and s. 8) appears at first sight to be well settled. (2) Dicey (Rule 137,

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(1) (1888) 40 Ch. D. 216, 230.

(2) Sect. 1, sub-s. 2 : "Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

Sect. 8 : "Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such

Case I., in his Conflict of Laws) states the result of the decisions thus: "If both the law of the father's domicil at the time of the birth of the child and the law of the father's domicil at the time of the subsequent marriage allow of *legitimatio per subsequens matrimonium*, the child becomes or may become legitimate on the marriage of the parents." The authorities cited are *Udny* v. *Udny* (1); *In re Wright's Trusts* (2); *In re Grove* (3), and they bear out the proposition. Now, John Bertram Askew was admittedly domiciled in Germany both at the date of the birth and at the time of the subsequent marriage. But what is the meaning of the phrase "the law of the father's domicil"? Does it refer to the municipal law or local law of Germany, or does it refer to the whole of the laws applicable in Germany, including the views entertained in Germany as to the rules of private international law? There is no doubt that Dicey means the latter (see his Interpretation of Terms, Definition II.); but in my opinion it is very doubtful whether the Courts who have dealt with the matter did not mean the former. The so-called doctrine of *renvoi*, which has been so much discussed by jurists of recent years, had not been formulated in earlier days; and those who look at the statement of the foreign law in the earlier cases (see, for example, *In re Wright's Trusts* (4) and *In re Grove* (5)) will find that the foreign law as stated was the local or municipal law, and that no evidence was adduced as to the rules of private international law applied in the foreign country. It would seem that rules of private international law, not being founded on custom or statute, but being based upon considerations of justice and what is called "comity," ought to be the same in all countries, though it is now well known (contrary to the belief

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subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law."

(1) L. R. 1 H. L. Sc. 441.

(2) (1856) 2 K. & J. 595.

(3) 40 Ch. D. 216.

(4) 2 K. & J. 595, 603-606.

(5) 40 Ch. D. 216, 220.

entertained by Lord Westbury: see *Udny* v. *Udny* (1)) that they are not. I am convinced that sixty or seventy years ago it never would have occurred to lawyers who were proving, say, the law of Italy (or France) in relation to the succession to an Englishwoman dying domiciled in Italy (or France) to depose (first) that the Italian (or the French) law gave a son a *legitima portio;* (secondly) that foreigners domiciled in Italy (or France) were deemed to retain their personal law; (thirdly) that he was informed that according to English law an English testator had a free power of disposition; and (finally) that, accordingly, by an application of Italian (or French) rules of private international law, the son had not (or had) a right to a *legitima portio.* It is on evidence of this kind that English Courts have now to decide cases relating to the succession to movables belonging to British subjects who die domiciled abroad, and other cognate matters. It may be added that there is generally an acute conflict of expert opinion as to the foreign law, which has to be proved afresh in each case. Foreign jurists and foreign Courts take from time to time varying views on the subject of *renvoi.* The result is not always satisfactory. It may, then, be useful to consider the question from the point of view of principle before dealing with the four modern authorities which must I think guide me in the matter.

I will take the case of John Doe, a British subject, who goes to a foreign country, the Commonwealth of Utopia, and there acquires a permanent home without any intention of returning to his native land. He does not care to become a naturalized Utopian, and he does not trouble to fulfil the legal formalities which Utopia requires before legally admitting him to a Utopian domicil. Now the State of Utopia is one which (I assume) has adopted what is called the principle of nationality for foreigners, including those who have permanently settled in the realm, and it accordingly applies their national law in all questions relating to their status, capacity, and the succession to their surplus assets and the like. The first question that arises is whether in these circumstances John Doe in an English Court can be said to have acquired a Utopian domicil. Clearly this depends upon the true meaning to be attached to the word "domicil." Until the decision of the House of Lords to be referred to later, this was at least doubtful; but it is now I think finally settled that in an English Court John Doe must be taken to have been domiciled in Utopia, because domicil is a pure question of fact and does not in any true sense connote a legal relation. In English Courts, English law must be applied; and by that law all these matters must be decided, at any rate prima facie, by the lex domicilii, that is, in the case under consideration, by the law of Utopia, and not the less that the Courts of Utopia attach no importance in such a case to the lex domicilii. Now the second question arises—when the English Courts refer the matter to the law of Utopia as the lex domicilii, do they mean the whole of that law, or do they mean the local or municipal law which in Utopia would apply to Utopian subjects? In order fully to appreciate this matter, it is necessary to answer the question, how comes it that an English Court applies to John Doe the system of law of Utopia to which he does not owe allegiance? The answer must be that, in the view of an English Court, John Doe, by acquiring a permanent home in Utopia, has attracted to himself the system of personal law which Utopia would apply to him, and it may be added that this would be in accordance with his presumed intention. Moreover, questions of private international law, in the absence of statute, depend largely on the historical views and the opinions of jurists which have been adopted in our Courts; and it is the fact that, for some hundreds of years before the nineteenth century, Continental and British jurists alike were practically united in the view that there existed in the world a number of civil societies based on domicil in the sense that the status and capacity of the members of those societies were governed by the lex domicilii, whatever their nationalities might be. In France, Italy, Germany and elsewhere a different principle—namely, that of nationality, has gradually been introduced and now prevails; but in the British Empire, including as it does within its area so many distinct systems of law, the old doctrine is retained, and domicil is still the criterion in our Courts of the personal law. If the law of Utopia had taken the same view as the English Courts and applied to John Doe the Utopian local law, there would of course be no difficulty whatever. But since the jurists of Utopia have adopted the principle of nationality as governing the question of his personal law, the result is that, when the English Court makes an inquiry as to the Utopian law, the first answer may be that Utopia prima facie applies to John Doe the laws of England. It is, I think, a misunderstanding of the problem to suggest that this leads to a deadlock. Like others before me, I have spoken of the lex domicilii as applying to John Doe; but it should not be forgotten that the English Court is not applying Utopian law *as such*, and the phrase is really a short way of referring to rights acquired under the lex domicilii. The inquiry which the Court makes is, of course, as to Utopian law as a fact, and one to be proved in evidence like any other. The inquiry might accurately be expanded thus: What rights have been acquired in Utopia by the parties to the English suit by reason of the de facto domicil of John Doe in Utopia? For the English Court will enforce these rights, though, I repeat, it does not, properly speaking, enforce Utopian laws. It is evident that, so stated, the question involves this. Have the parties acquired rights in Utopia by reason of the personal law of John Doe being English local law or Utopian local law? There is this alternative and no other. It is apparent that there is no room here for a deadlock, and that the circulus inextricabilis is no better than a (perhaps amusing) quibble.

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(1) L. R. 1 H. L. Sc. 441, 457. [The substitution of nationality for domicil by modern Continental doctrine and legislation as the criterion of personal law was at that time a novelty.—F. P.]

The English judges and the foreign judges do not bow to each other like the officers at Fontenoy. The English Court has to decide a matter within its jurisdiction according to English law in the wide sense, and if the matter depends on foreign domicil it is only necessary to prove certain facts as to rights under the foreign law. It is therefore, I think, clear that, when we inquire whether John Doe has acquired rights in Utopia by Utopian law, we must mean by the whole of the laws of Utopia including any views of private international law which may be deemed to give him rights (or subject him to restrictions), though an Englishman settled in that land. A final question may sometimes remain—namely, whether the lex domicilii is one which the English Courts can recognize. If it is (as it nearly always is), we have only to ascertain what the lex domicilii in the wider sense is. I will add that I am not aware of any satisfactory definition of the term *renvoi* ; but it will be noted that, if I am right, an English Court can never have anything to do with it, except so far as foreign experts may expound the doctrine as being part of the lex domicilii.

I will now deal with the four authorities to which I have referred. The first is the much discussed case of *In re Johnson.* (1) Farwell J. had there to consider the proper distribution of the movables of Miss Johnson, a British subject domiciled at her birth in Malta, but at the date of her death (which took place in 1894) domiciled de facto in the Grand Duchy of Baden, where she had not been naturalized. By the certificate of the Master it was found that according to the law of Baden the legal succession to the property of the deceased of which she had not disposed by will was governed solely by the law of the country of which the testatrix was a subject at the time of her death.

Now it is clear that Lord Westbury in *Bell* v. *Kennedy* (2) and in *Udny* v. *Udny* (3) had thought that what he termed civil status was determined by the single criterion of domicil, that international law depended on rules common to the jurisprudence of all civilized nations, that, accordingly, in all such countries, an acquired domicil would be recognized as attracting to the individual the municipal law. In the case of *Abd-ul-Messih* v. *Farra* (4) Lord Watson (approving a decision of Chitty J. in *In re Tootal's Trusts* (5)) had followed the same line. He said, after referring to *Udny* v. *Udny* (1): "According to English law, the conclusion or inference is that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend." Now, Farwell J. had to apply these views to a case where the foreign law said that the propositus had retained his national law. Having come to the conclusion that the Courts of Baden paid no heed to domicil, he not unnaturally decided, following the dicta I have referred to, that there could be no domicil of choice, since "a domicil of choice ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen was for that purpose no domicil at all," and that the propositus was left with his domicil of origin unaffected. He added that the Baden Courts would in effect have disavowed him and disclaimed jurisdiction. There was a second ground for his decision—namely, that, even if the Baden Courts would not really have refused jurisdiction, he was of the opinion that when those Courts said that they looked to the nationality of the propositus, that must result in distribution according to the law of nationality, i.e., according to the law of England (2) as applicable to the particular propositus and therefore according to her domicil of origin, which was Malta. Accordingly the decision was that the movables must be distributed according to the law of Malta, not according to the municipal law of England.

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(1) [1903] 1 Ch. 821.

(2) (1868) L. R. 1 H. L. Sc. 307, 320.

(3) L. R. 1 H. L. Sc. 441.

(4) (1888) 13 App. Cas. 431, 439.

(5) (1883) 23 Ch. D. 532.

It is, I think, evident that Sir George Farwell's judgment was mainly based on the dicta and the views of Lord Westbury and Lord Watson, which, since the decision I am now going to mention, can no longer be treated as correct.

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(1) L. R. 1 H. L. Sc. 441.

(2) [A compendious name for the legal result of allegiance to His Britannic Majesty: there is no suggestion in the present case of any presumption that a British subject's personal law is that of England rather than any other part of the Empire. Such a suggestion has been made elsewhere, but, it is submitted, without foundation.—F. P.]

In the important case of *Casdagli* v. *Casdagli* (1) the question arose whether a petition for dissolution of marriage can be entertained by an English Court if presented in a case where the marriage and the domicil de facto was Egyptian. The husband, who was the respondent, and a British subject, objected to the jurisdiction, while the wife set up the contention that the husband, being a British protected subject and entitled to privileges and immunities by reason of the extra-territorial jurisdiction exercised by His Majesty in that country, could not in law acquire an Egyptian domicil. In the Court of Appeal (2) this view prevailed, Scrutton L.J. dissenting. In the House of Lords the decision of the Court of Appeal was overruled, and Lords Finlay, Haldane, Dunedin and Phillimore expressed approval of the judgment of Scrutton L.J. The House of Lords overruled the opinion of Chitty J. in *In re Tootal's Trusts* (3), and some of the dicta of Lord Watson in *Abd-ul-Messih* v. *Farra* (4), including a dictum that "residence in a foreign state, as a privileged member of an extra-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice." In effect the House of Lords declined to accept the view that domicil was a relation created by law between an individual and a country involving that the individual had attracted to himself the municipal law of that country. The conclusion was come to that the husband had in fact acquired a legal Egyptian domicil, and not the less that he was entitled to the privileges conceded by the Capitulations, which were regarded in the House as privileges made effectual by Egyptian law and not by English law. The judgment of Scrutton L.J. having been accepted in the House of Lords, I return to that judgment, and I accept his view that in such a case as the present there are two questions to be determined, the first question being: Is there a domicil or permanent home, which depends on the fact of residence and an intention to

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(1) [1919] A. C. 145.
(2) [1918] P. 89, 110, 111.
(3) 23 Ch. D. 532.
(4) 13 App. Cas. 431, 445.

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continue to reside; and the second question being: Is there a lex domicilii which the English Courts will recognize? He goes on to say this: "The law administered may vary with the nationality of the resident; a German Court may administer different law for a Belgian and a Russian in the matter of status. The law of the domicil would appear to be the law which the sovereign of the domicil would administer in the case of the domiciled person. If so, can it make any difference whether the sovereign of the domicil administers the law directly, or allows another sovereign by grant to exercise part of his sovereignty by administering such law as he pleases in Courts which the sovereign of the domicil allows to exist in his territory? The law appears to be still the law of the domicil, allowed to be administered in the country of the domicil by the sovereign power of that country, whose consent is necessary for its administration. Practical and theoretical difficulties arise from the fact that, while England decides questions of status in the event of conflict of laws by the law of the domicil, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back (*renvoyer*) the decision to the law of nationality, there is an inextricable circle in 'the doctrine of the *renvoi*,' and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its Courts, it may well apply its own law as to the subject-matter of dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicil says, 'We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects.' This is the German solution of the difficulty." (1)

Error
see [1918]
P. p. 111

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(1) See footnote *In re Johnson* [1903] 1 Ch. at p. 831.

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This decision seems to me to clear up more than one point of considerable difficulty. In the first place it follows, I think, that Lord Westbury's dictum in *Bell* v. *Kennedy* (1) that domicil is "the relation which the law creates between an individual and a particular locality or country" is no longer to be relied on. Nor is it true to say that "residence in a foreign country without subjection to its municipal laws and customs is . . . . ineffectual to create a new domicil." It is reasonably clear that domicil does not depend upon the question of the attraction of the local or municipal law, and that the fact that the local Courts decide a question arising as regards a foreigner in their land solely by the law of his nationality is no reason for treating those Courts as disclaiming jurisdiction. Accordingly I think the case of *In re Johnson* (2) and the reasons given for that decision by Farwell J. are no longer of authority.

I will now deal with the case of *In re Annesley.* (3) In that case Russell J. had to determine, first, whether the domicil of the testatrix was English or French, she having died in France without having acquired a formal French domicil according to French law, and secondly, whether French municipal law applied to her so that she had power only to dispose of one-third of her movable property. It was clear that the testatrix had acquired a permanent home in France, and that she had no intention of returning to this country. The learned judge, basing his view on the decision in *Casdagli* v. *Casdagli* (4) to which I have referred, declined to follow *In re Johnson* (2) in so far as that case decided that a domicil in a foreign country not recognized by the law of that country is in the eye of the English law no domicil at all; and he followed his own view that the question of domicil was to be determined in accordance with the requirements of English law as to domicil, and accordingly that the domicil of the testatrix at the time of her death was French. He then had to determine whether French (municipal) law ought to be applied, or whether the national law of the testatrix—

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(1) L. R. 1 H. L. Sc. 307, 320.

(2) [1903] 1 Ch. 821.

(3) [1926] Ch. 692.

(4) [1919] A. C. 145.

namely, English (municipal) law ought to be applied. The French experts differed strongly on what is called the doctrine of *renvoi*, two experts taking the view that a French Court would distribute the movables of the testatrix in accordance with English municipal law, and one expert equally strongly taking the view that a French Court would accept the *renvoi* and distribute in accordance with French municipal law. The learned judge came to the conclusion that he must accept the latter view, having regard to two decisions of the Court of Cassation in France. The result was that he held that the testatrix had power only to dispose of one-third of her movable property by her will.

In the case of *In re Annesley* (1), however, the learned judge suggested an alternative ground for his decision that French municipal law was to apply. He expressed himself in the following terms: "Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of *renvoi* need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York." It may be observed that this simple and rational solution is one that does not

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(1) [1926] Ch. 692, 708.

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lead necessarily to the same result as that at which Russell J. arrived on his view of the French law, including the rules of private international law, as a fact applicable to the case. What may be called the short route resulted in the application of the municipal law as the law of the domicil in the case of *In re Annesley* (1), but that route would have resulted in a decision contrary to that which Luxmoore J. pronounced in the case I am about to mention, and he found it necessary therefore to reject that part of the judgment of Russell J.

The last case I have to refer to is that of *In re Ross.* (2) The testatrix, an Englishwoman whose domicil of origin was English, had acquired a domicil in Italy, and by her testamentary dispositions excluded her son and only child from any share in her movable and immovable property situate in Italy, and in her movable property situate elsewhere than in Italy. There was again some conflict of evidence as regards the foreign law, but the learned judge accepted the views of two Italian experts who deposed that the Italian Courts would determine the case on the footing that "the English law applicable was that part of the law which would be applicable to an English national domiciled in England." (3) It was clear that the Italian Courts looked to the doctrine of nationality, and apparently applied the local law of the nationality. The learned judge went through nearly all the reported cases on the question whether the English rule which refers such a matter to the lex domicilii refers only to that part of the domiciliary law which is applicable to nationals of the country of domicil, that is, to the local or municipal law, or whether the phrase refers to the whole law of the country of domicil, including the rules of private international law. Without wholly agreeing with his explanation of all the cases, I think there can be no doubt that he was right in coming to the conclusion that the latter view is correct; and like Russell J. he declined to follow the case of *In re Johnson.* (4) As I have already pointed out, he also declined to accept the alternative ground

(1) [1926] Ch. 692.
(2) [1930] 1 Ch. 377.
(3) [1930] 1 Ch. 377, 404.
(4) [1903] 1 Ch. 821.

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on which Russell J. was disposed to decide the case of *In re Annesley.* (1) It will be seen that I fully agree with the substance of this decision; but I would be inclined to express some passages in the judgment in a somewhat different form, for, as I have said, I think the foreign law is a matter of fact in our Courts. If the proposition that, where a British national dies domiciled in a foreign country, his movables here must be distributed according to our view of what the Courts of that country would decide in the particular case, means that generally speaking we must ascertain the foreign municipal law and also the rules of private international law applied by the foreign country, and then decide the case, I respectfully agree; but if the proposition is to be taken literally, I think there should be a qualification. I do not think an English Court administering the estate of a British national in this country is bound to follow the decisions of all foreign Courts, however erroneous or unreasonable. I am not convinced that an English Court is bound to accept all the views of a foreign Court on the rules of private international law, where they plainly conflict with our notions of comity. And further there may be legislation in the foreign country directed specifically against persons who are foreigners in that country which an English Court would not be disposed to enforce. Suppose, for example, a law passed in a country that every foreigner who died there without having been naturalized must be held to die intestate, or must have the whole of his movables wherever situate forfeited to the State, or is only empowered to bequeath his property to subjects of that State, other legacies being void, would our Courts be bound to enforce such a law? It is one thing to hold that the law of England requires that the movables of a British subject who dies domiciled in a foreign country shall be administered in accordance with the law which that country would apply to its own nationals, and another to hold that our law in all cases requires his movables to be administered as the law of that country requires in the case of foreigners. In my opinion the safer view is that an English

(1) [1926] Ch. 692.

Court in deciding a question arising here as to the administration of the movables of an Englishman who has died abroad, or as to the status of such a person, is deciding a question of English law in the wide sense, which may no doubt include or involve in a particular case the consideration of foreign views on private international law, but allows us a certain power of discrimination in the application of them. As Scrutton L.J. remarked in *Casdagli* v. *Casdagli* (1) the lex domicilii must be one which our Courts will recognize.

I will now return to the present case which, if I am right in the views above expressed, will present little difficulty. There is fortunately no contest as to the German law, for the affidavit of Dr. Hellmut Rost, a Doctor of Laws of the University of Erlangen, was accepted by all parties as being correct, another affidavit being withdrawn. Dr. Rost deposed as follows :—

"The child Margarete Askew is according to German law legitimated by the subsequent marriage of John Bertram Askew and Anna Wengels. I have come to this conclusion on the following grounds :—

"The German Civil Code and the introductory Act does not contain any specific rule as to the effect of a subsequent marriage of the parents of an illegitimate child where the father of the child is not a German national, but only provides that where the father is a German national the question is to be decided by German law" (art. 1719 of the Civil Code, combined with art. 22 of the Introductory Act). "A general principle of the German law is, however, that the law of the country of which the father at the time of the marriage is a national governs the question of legitimation per subsequens matrimonium."

"I am informed and believe that John Bertram Askew was an Englishman. Therefore English law would be applied by the German Court in deciding the question. (I am informed that the English law refers the question back to the law of the domicil, in the present case German law.) The German Court would in these circumstances first have to decide whether to apply the municipal law of England only, or also the principles of international private law as interpreted by the English Courts. The rule followed by the German Court is that both the municipal law and the rules of international law, as interpreted by the English Court, are to be applied. The German Court therefore accepts the *renvoi*. There is no general statutory rule of German law as to which municipal law in the case of *renvoi* as in the present case is to be ultimately applied. The question has however been decided by numerous decisions of the Reichsgericht, the Court of the highest instance in Germany (confer Reports, vol. 62, p. 404; vol. 64, p. 393; vol. 78, p. 28, and others). These decisions are to the effect that in a case where the German law provides that the law of the nationality is to govern a question and the law of nationality refers to the law of domicil and the domicil is German, the German Court is to apply German municipal law.

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(1) [1918] P. 89, 110.

"I am therefore of opinion that the German Court would hold that according to German law Margarete Askew was legitimated by the marriage of her parents notwithstanding the fact that her father at the time of her birth was still married to a woman other than her mother and that by reason of the legitimation the child Margarete Askew has become issue of the marriage between John Bertram Askew and Anna Askew née Wengels."

I take this deposition as proving as a fact that the defendant Margarete Askew acquired in Germany the status of legitimacy. For the reasons given above I hold that in an English Court the lex domicilii in the wide sense must prima facie apply, and, this being a law which the English Courts will recognize, the conclusion is that the defendant Margarete is a legitimate child of John Bertram Askew in our Courts and that the power of appointment was effectively exercised in her favour.

I think it proper to add that in my opinion it is unsatisfactory to find that, upon the evidence adduced in the two cases of *In re Annesley* (1) and *In re Ross* (2), the Courts were bound to hold that, although both in France and in

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(1) [1926] Ch. 692.

(2) [1930] 1 Ch. 377.

Italy the national law of the *de cujus* is held to prevail, yet, owing to a divergence on the theoretical question of *renvoi*, the property and capacity of an Englishman domiciled in Italy is held to be a matter of (local) English law, whilst the property and capacity of an Englishman domiciled in France is held to be a matter of local (French) law. Nor is there any certainty that a contrary result will not be reached upon the evidence adduced in the next two cases which arise as to persons dying in France and Italy respectively. Those who have any acquaintance with the extensive literature that has appeared on the Continent on the subject of *renvoi* and the great diversity of view that exists would not be surprised to find that the legal decisions in France and Italy, where legal decisions are not binding as authorities to be followed, had changed in their effect. An Englishman domiciled de facto in France can have no certainty that his personal law is the municipal law of France, nor can he be sure if he crosses the frontier and becomes domiciled de facto in Italy that the municipal law of England will become his personal law. It may be added that views which seem strange to an English lawyer are entertained on these matters in some Eastern countries and also in some of the States in South America; and in those countries the result of acquiring a domicil must be very doubtful. I cannot refrain from expressing the opinion that it is desirable that the position of British subjects who acquire domiciles in countries which do not agree with our views as to the effect of a foreign domicil should be made clear by a very short statute. There is much to be said for the "simple and rational solution" suggested by Russell J. in *In re Annesley* (1); but whether the municipal law of the foreign country or the municipal law of England is to be held applicable in British Courts in these cases, it is clearly desirable that the matter should be certain and should not be held ultimately to depend on the doubtful and conflicting evidence of foreign experts.

Solicitors: *Williams & James; Buckeridge & Braune.*

(1) [1926] Ch. 692.

K. R. A. H.

ATTORNEY-GENERAL TO THE PRINCE OF WALES *v.* BRADSHAW.

[1930. A. 1185.]

FARWELL J.

1930

June 25.

Law of Property—Copyhold—Enfranchisement—Extinguishment of manorial Incidents—Copyholder in Fee—Death after Enfranchisement but before Extinguishment—Executor's Liability to pay Fine on Death—Law of Property Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 16), *ss.* 128, 129, 130, 138, 189; *Schedule* 12, *para.* 8 (*a*); *Schedule* 13, *Part* 2.

The custom of a manor was that copyholders pay fines "upon descent or alienation when they take up their several lands and tenements."

A copyholder in fee of settled copyholds died in 1928 after the copyholds had been enfranchised under s. 128 of the Law of Property Act, 1922, but before the manorial incidents (including fines) saved thereby had been extinguished under s. 138. He had devised the property under a testamentary power:—

Held, that his special executor in whom the settled land was vested under the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), ss. 1, 3, 22, must pay a fine on the death, although he had not assented to the devise, or conveyed the property to a purchaser, or done any other act formerly involving admittance and payment of a fine.

Special Case.

This action was commenced on May 13, 1930, but the parties subsequently arranged to state a special case to determine the questions of law.

The Prince of Wales was Lord of the Manor of Kennington, part of the Duchy of Cornwall. By the custom of the manor, as recorded in a survey of 1649, "the copyholders of the said manor pay upon descent or alienation when they take up their several lands and tenements fines merely arbitrable at the will of the Lord."

By his will dated January 22, 1853, a testator who died on July 12, 1855, seised of copyholds of the said manor for an estate in customary fee simple in possession devised the same unto and to the use of his son Octavius Bradshaw his heirs and assigns in trust for Octavius Bradshaw for life and after his decease in trust for such of his issue as he should by will appoint.

On December 21, 1855, Octavius Bradshaw, who was born on February 5, 1845, was admitted tenant on the court rolls of the copyholds so devised to him in trust.

Under an order of July 13, 1885, and subsequent events and documents ending with an appointment of new trustees dated December 2, 1927, the defendant (born August 8, 1897) and others became Settled Land Act trustees of the will.

On January 1, 1926, the Law of Property Act, 1922, came into operation, and the land was enfranchised.

On January 16, 1928, Octavius Bradshaw died, and on November 16, 1928, his will and codicils, save and except settled land, were proved by his son and surviving executor Cecil Pellew Bradshaw, in favour of whom, subject to an appointment of 18,000*l.* on other trusts, the testamentary power of appointment in the original will was exercised.

On July 3, 1929, the defendant proved Octavius' will and codicils as to the settled land, and administration was granted to him as a Settled Land Act trustee, and as such the executor as to the settled land, power being reserved to the other trustees to prove which they had not done.

The defendant had applied to the lord of the manor to enter into an agreement with him under s. 138, sub-s. 1 (*a*), as to the compensation for the extinguishment of the manorial incidents affecting the land, but the negotiations had been suspended pending the determination of questions arising from the doubt whether a fine had or would become payable by reason of Octavius Bradshaw's death.

The questions submitted were :—

1. Whether the defendant had become and was liable to pay a fine to the lord by reason of Octavius Bradshaw's death ?

2. In the alternative, whether a fine by reason of that death would become payable by the defendant or other the tenant for the time being within the meaning of the 1922 Act on whichever of the following events first happened—namely, (*a*) an assurance of the land being made within s. 129 or (*b*) the extinguishment of the manorial incidents by the happening of one of the events mentioned in s. 138, sub-s. 1 ?

3. In the further alternative, whether such a fine would become payable by reason of Octavius Bradshaw's death upon some, and if so what, other event ?

The plaintiff contended that by reason of the said death a fine had become payable, or in the alternative would become payable, upon whichever of the events mentioned in question 2 first happened.

The defendant contended that no fine had become, or would in any event become, payable by reason of the said death.

The amount of the fine, if payable, was large, and it was important to determine the questions promptly and without waiting for any subsequent events.

The relevant provisions of the 1922 Act are set out in the judgment, with the exception of s. 130, which appears in the defendant's argument. Schedule 12, para. 8, proviso (ii.), was not referred to.

Hon. Geoffrey Lawrence K.C. and *J. H. Stamp* for the plaintiff. Under the old law before January 1, 1926, when a copyholder in fee died his devisee or customary heir at once had a qualified title, which became complete on admittance. The lord had an inchoate right to a fine, which was payable on or after admittance. If the devisee or heir did not come in for admittance, the lord could seize quousque. That was his only way of enforcing admittance and getting his fine. But it was generally effectual: Coke's Complete Copyholder, s. 41; Elton on Copyholds, 2nd ed., p. 149; Watkins on Copyholds, 4th ed., vol. i., p. 302; *Brown's* case (1); *Hobart* v. *Hammond* (2); *Doe* v. *Muscott* (3); *Earl of Bath* v. *Abney*. (4)

About eight years ago the Legislature, desiring to abolish copyhold tenure without confiscation of the lord's rights, passed the Law of Property Act, 1922. This Act came into operation on January 1, 1926, immediately before the Law of Property Act, 1925: see Law of Property Act (Postponement) Act, 1924 (15 Geo. 5, c. 4) and Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 202.

Sect. 128 enfranchised all copyholds, abolished customary assurances, and turned the tenure into free and common socage.

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(1) (1581) 4 Co. Rep. 21*a*.

(2) (1600) 4 Co. Rep. 27*b*.

(3) (1844) 12 M. & W. 832.

(4) (1757) 1 Burr. 206, 218.

FARWELL J.

1930

ATTORNEY-GENERAL TO THE PRINCE OF WALES *v.* BRADSHAW.

It however saved the manorial incidents (including fines) until extinguishment, and provided that "the enfranchised land and the persons for the time being entitled thereto shall until the manorial incidents so saved are extinguished, remain subject thereto in like manner as if the land had not been enfranchised."

The copyholds, having become freeholds, devolved on the personal representative under the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), ss. 1, 3, and the defendant, as special executor under s. 22, is now the person entitled thereto. His title is complete without the obsolete machinery of admittance, but he remains liable for the admittance fine.

A very similar point arose in *Lord Leconfield* v. *London and North Western Ry.* (1) Copyholds conveyed to the railway by a conveyance subsequently enrolled under s. 95 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), passed as freeholds on enrolment, but until enfranchised by the railway they remained subject to the same fines, etc., as were theretofore payable. Those fines had to be included in the compensation for enfranchisement, and Swinfen Eady J. held that death fines must be included, though on the facts no admittance was possible.

Sect. 129 provides for the production of assurances, including assents to the steward for indorsement and the payment of fines due on the transaction. Otherwise they become void in six months. That provision is only meant to ensure that the lord gets notice of a transaction involving a fine, and is not very material.

Sect. 130 only deals with fines payable on transactions formerly capable of being effected by customary assurance. It does not touch fines payable on descent, or in any way limit s. 128.

Sect. 138 provides for the extinguishment of manorial incidents in certain ways, but saves any manorial incident (e.g., this fine) due or enforceable before the date of the extinguishment.

By ss. 134 and 141 Parts 5 and 6 of the Act apply to the Duchy of Cornwall.

(1) [1907] 1 Ch. 38.

"By s. 189 'copyholder in fee' means the person (here Octavius) who is admitted in respect of the inheritance"; and "'tenant' means the person in whom the enfranchised land is vested by virtue of this Act, and includes the persons deriving title under him." In other words "tenant" means Octavius, and includes the defendant.

Under Schedule 12, para. 8 (*a*), the freehold vested in Octavius. If he had died before the Act it would have vested in the defendant under para. 8 (*b*), expressly subject to the fines that would have been payable by him on admittance. Para. 8 (*b*), though not applicable here, is a guide to the meaning of the Act. If Octavius had died a few days before the Act it would have vested in the defendant subject to the fines, though admittance was on the eve of extinction.

Schedule 13, Part 2, speaks throughout of fines payable on alienation by "as well as on the death of" a tenant. It ignores "admittance" as entirely irrelevant.

Wilfrid Greene K.C. and *Winterbotham* for the defendant. Under the old law fines were never payable on death but only after (not on) admittance, and if the admitted tenant refused payment there was a forfeiture: *Hobart* v. *Hammond.* (1) If the lord refused to admit without prepayment mandamus would lie. Under the present law the land is vested in the defendant as special executor for administrative purposes, and if he conveys or assents a fine will become payable by the purchaser or devisee as if on admittance. But surely the lord is not intended to have two fines, one on death and a second on assent. The land is vested in the defendant, not under Schedule 12, para. 8 (*b*), which has no application, but as the special executor of Octavius under the Administration of Estates Act, 1925, ss. 1, 3, 22.

Sect. 128 imposes no new liability on any one. It merely provides that the enfranchised land and the persons for the time being entitled thereto shall "remain" subject to fines, etc., "in like manner as if the land had not been enfranchised." Now before the Act the personal representative was not in the picture at all. He was under no liability. How does he become liable under this section ?

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(1) 4 Co. Rep. 27*b*.

Sect. 129 really bears this out. The lord of course had notice of any admittance, and could get his fine thereon. Now he will have production of a conveyance or assent, and can get his fine from the purchaser, devisee or heir on indorsement. Of course he cannot compel assent, any more than he could compel admittance. The seizure quousque weapon is gone, and the fine when payable becomes a simple contract debt barrable in six years : s. 130, sub-s. 5.

Sect. 130. "Provisions as to fines and heriots" is the section pointed to by the words "save as otherwise expressly provided" in s. 128, sub-s. 2.

Sub-s. 1 provides that until the manorial incidents saved by Part 5 have been extinguished the same fines shall (subject as hereinafter provided) be payable on any "transaction" (formerly capable of being effected by a customary assurance), which would have been payable if the land had remained copyhold and the "transaction" had been effected by a customary assurance, and the same payments in lieu of heriots shall be payable on the same occasions on which a heriot would have accrued if the land had remained copyhold.

Sub-s. 5 provides that "fines and heriots (whether payable before or after the commencement of this Act) shall be recoverable as simple contract debts and not otherwise, and shall not be recoverable (in the case of fines and heriots becoming payable after such commencement) after the expiration of six years from the date when they become payable, or (in the case of fines and heriots payable at the commencement of this Act) after the expiration of six years from such commencement."

That is a complete and exhaustive statement as to the fines and heriots payable during the interregnum between the enfranchisement and the extinguishment of manorial incidents. Heriots are payable on death. Fines are payable on a "transaction" formerly capable of being effected by a customary assurance, e.g., surrender or assent and admittance.

Of course if an assent is an inter vivos transaction, the section qua fines is confined to inter vivos transactions.

The proviso to s. 138, sub-s. 1, only saves manorial incidents "due or enforceable before the date of the extinguishment" from being affected thereby. Unless therefore we convey or assent before extinguishment the proviso does not apply, as no fine is due on death alone.

The language of Schedule 13 in speaking of a fine payable on death is loose and inaccurate. It is only a compensation schedule, and certainly does not impose any such fine. *Lord Leconfield's* case (1) was dealt with as if the fines were payable on death. The point that they were only payable on admittance, which had become impossible, was not taken.

Hon. Geoffrey Lawrence K.C. in reply. The death fine is payable now, but the defendant can avoid a second fine by postponing his assent till after extinguishment.

FARWELL J. [after stating the facts:] The question turns upon the true construction of certain provisions of the Law of Property Act, 1922. As soon as the Act came into force lands then copyhold became freehold, and the then copyhold tenants became owners in fee of the land of which they had been tenants. But the Act saved certain of the fines and other rights which the lord of the manor had before January 1, 1926, when the Act came into force, and it is in respect of the saving of those fines and rights that the present question arises.

Under the combined effect of this Act and the Administration of Estates Act, 1925, the land of a deceased copyhold tenant vests on his death in his personal representative in fee simple. Under the Administration of Estates Act, 1925, as under the Land Transfer Act, 1897, real estate, not including copyholds, vested in the personal representative; and as the 1922 Act converts copyholds into freeholds they now vest in the personal representative as freeholds.

The first material section is s. 128 at the beginning of Part 5, headed: "Abolition of Copyhold and Customary Tenure. Abolition of Copyholds."

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(1) [1907] 1 Ch. 38.

Sub-s. 1 provides that as from the commencement of this Act, every parcel of copyhold land shall by virtue of this Act be enfranchised and cease to be of copyhold or customary tenure, and land so enfranchised is in this Act referred to as enfranchised land.

Sub-s. 2 provides that the enfranchisement by virtue of this Part [Part 5] of this Act shall have the effect stated in Schedule 12: Provided that (save as otherwise expressly provided) nothing in this part of this Act shall affect the following manorial incidents; that is to say—. . . . (*b*) fines, reliefs, heriots, and dues (including fees payable to stewards); . . . . and accordingly (subject to the provisions of this Act) "the enfranchised land and the persons for the time being entitled thereto shall, until the manorial incidents so saved are extinguished, remain subject thereto in like manner as if the land had not been enfranchised"; but so that in lieu of any chattel liable to be seized as a heriot a sum equal to the value thereof shall be payable.

Sub-s. 3 provides that modes of assurance authorized by special custom are hereby abolished; and all land (including land held in free tenure but subject to custom) shall be dealt with as land held in free and common socage discharged from custom.

It is not difficult to perceive the Legislature's intention in that section. It enfranchised all copyhold lands, but it reserved for the lord for a given period the fines and other rights which he had, and would have continued to have and enjoy if the Act had not come into force.

The difficulty here arises for this reason. Under the old law and the custom of the manor a copyhold of the manor estate of the deceased would have passed on the tenant's death to his devisee or customary heir. That devisee or customary heir became entitled to the property, but had no good title against the lord until admittance, which admittance involved payment of a fine. In default of admittance, the lord's remedy was to seize quousque. He could not sue for and recover the fine. Seizure quousque was his only remedy, if no admittance was sought, and no fine paid thereon. If the tenant desired to retain the property he was bound to obtain admittance and pay the fine.

This position has now been altered. On the tenant's death the property no longer passes to his devisee or heir, but vests in his personal representative. That personal representative is the person entitled to the land, and there is nothing under the old law which in all respects applies to the present position. The whole copyhold has been enfranchised, and there is no longer any question of admittance.

The question is this: Is the fine that would have been payable if the devisee or heir had sought admittance still payable, and if so by whom? Or is the true position that on the tenant's death his personal representative (though not in the position of an admitted tenant) becomes indefeasibly entitled, and the fine is not payable unless and until he sells and conveys the property to a purchaser, or by means of assent conveys it to the beneficiaries?

The defendant contends that the true view is that as soon as the tenant dies the property vests in the personal representative, but unless and until he seeks to dispose of it by assent or conveyance there is no obligation to pay a fine at all. The defendant says that strictly speaking, in this manor at all events, there was no such a thing as a fine payable upon death simpliciter. The death did not necessitate payment of the fine. The devisee or heir was not obliged to seek admittance. He could sacrifice the land and allow the lord to seize, in which case no fine became payable. The fine only became payable on admittance. He contends accordingly that no fine is payable unless and until there is some person who by reason of some act of the personal representative has become entitled to the land and therefore is in the position of a devisee or heir seeking admittance.

Some force for that contention is found in s. 129, which provides by sub-s. 1 that "so long as any of the manorial incidents saved by [s. 128] remain unextinguished as regards any enfranchised land, an assurance of that land, or of any interest therein, shall, subject as hereinafter provided, on the expiration of six months from the date of its execution, or of such extended period as the court may either before or after the expiration of those six months for any special reasons allow, become void so far as regards the grant or conveyance of a legal estate, unless the assurance has been produced to the steward of the manor."

That provision is inserted to ensure that the person formerly in the position of lord of the manor shall have notice of an act which under the old law would have given him the right to a fine, and which under the present law still entitles him to payment of a fine, that fine being saved by s. 128. The effect of sub-s. 1 is, that unless the assurance is produced to the steward within six months, or the extended time, it becomes void.

Sub-s. 2 provides that "on production to him within the time allowed . . . . of such an assurance and on payment of any fines . . . . payable in respect of the transaction . . . . the steward shall forthwith return the assurance and indorse the same with a certificate [of production]."

Sub-s. 9 provides that "for the purposes of this section, the expression 'assurance' does not include a will . . . . but does include an assent by a personal representative . . . . operating to vest land or any interest therein in any person, and where an assurance by a personal representative is produced for indorsement the probate of the will, or the letters of administration, shall also be produced by the personal representative at the cost of the person requiring the production."

That sub-section certainly shows that if the personal representative assents to the devise of land formerly copyhold but now freehold the person in whom the land vests by virtue of that assent is bound to produce the assent to the steward within the time limited, and in that case he may be bound to pay a fine. But that does not determine the question I have to determine.

I must now refer to Part 6 of the Act headed: "Extinguishment of Manorial Incidents." Sect. 138, sub-s. 1, provides that the manorial incidents affecting enfranchised land saved by Part 5 of this Act, and all manorial incidents of a like nature affecting any other land, shall by virtue of this Act be extinguished in respect of the land thereby affected, but subject to the payment of such compensation (if any) in respect of any manorial incidents referred to in Schedule 13, Part 2, whether the incidents are saved by Part 5 of this Act or not, as is payable under the provisions of Part 6, upon the happening of any of the following events :—

"(*a*) where an agreement in writing between the lord and the tenant . . . . as to the compensation for the extinguishment is made within ten years after the commencement of this Act, then upon the execution of the agreement;

(*b*) where a notice requiring the ascertainment of such compensation is served by the lord on the tenant or by the tenant on the lord within ten years after the commencement of this Act, then upon service of the notice; but the lord shall not be entitled to serve such notice till after the expiration of five years from such commencement;

(*c*) where no such agreement has been made or notice served before the expiration of ten years after the commencement of this Act, then upon the expiration of those ten years;

Provided that—

(i.) the extinguishment of manorial incidents so effected shall not extend to or affect the right to enforce any manorial incident which has become due or enforceable before the date of the extinguishment."

The effect of that section is this. The right to manorial rights may be put an end to before the expiration of 10 years either by an agreement under (*a*) agreeing the amount of the compensation, or by a notice under (*b*) requiring ascertainment of the compensation and payment of the agreed or ascertained amount accordingly. In default of such agreement or notice the right determines at the end of 10 years. Until determined the right to the fine continues, but future liability can be put an end to by agreement and payment of compensation once and for all.

Sect. 189 provides that "copyholder in fee" means the person who is admitted in respect of the inheritance, and "tenant" means the person in whom the enfranchised land is vested by virtue of this Act, and includes the persons deriving title under him.

Schedule 12, headed "Effect of Enfranchisement," provides as follows :—

Para. 1 provides that the following provisions shall, from and after the commencement of this Act, apply with respect to the enfranchised land :—

"(*a*) The land shall be freehold land and be free from liability for forfeiture for the conveyance or attempted conveyance of an estate of freehold in the land, or for alienation without licence, whether by way of sale, lease, mortgage or otherwise."

Para. 7 provides that "a right preserved to the lord by virtue of this schedule shall not for the purposes of Part 6 of this Act be deemed to be a manorial incident unless it is otherwise agreed."

Para. 8 provides that "on the enfranchisement of any land by virtue of this Act :—

(*a*) If there is a copyholder in fee (not being a mortgagee) the freehold estate in fee simple shall vest (subject as provided in this schedule) in that person.

(*b*) If there is no copyholder in fee the freehold estate in fee simple shall (subject as provided in this schedule) vest in the person who immediately before the commencement of this Act had the best right to be admitted as copyholder in fee otherwise than as mortgagee, but such person shall (save as hereinafter provided) be personally liable to pay the fines and fees which would have been payable by him on admittance; and if the last person who was admitted as copyholder in fee (being a trustee) has died before the commencement of this Act (whether or not having disposed of the land by will), his personal representative, if any, shall be deemed to have had a better right to be admitted than the devisee or customary heir."

I ought perhaps also to refer to Schedule 13, Part 2, headed "Scale of Compensation for Extinguishment of Manorial Incidents." It provides for the method by which compensation is to be assessed.

Paras. 1 to 4 refer to fines arbitrary, which is this case.

Para. 1 provides that in fine arbitrary cases where a fine is payable on alienation by, as well as on the death of, a tenant, the compensation for fines shall not exceed the number of years' annual value of the land according to the age of the tenant as set forth in the table annexed to the schedule.

Para. 5 provides a different method for fines certain. The table is contained in para. 18.

Now it is clear that the defendant is a person in whom the land is vested in fee simple. The defendant is in the position of a person absolutely entitled to the land against every one, including the former lord. So far therefore as the lord is concerned the defendant is in the same position as a person who before the Act had obtained admittance. The defendant must therefore be taken and treated as though he had been not only the person in whom the land vested on Octavius' death, but as the person who had also obtained admittance.

The effect of the Act is this. Where the copyholder in fee dies, the person who has the best right to be admitted is the personal representative, in whom the enfranchised estate now vests in fee simple. I must treat the matter as though the personal representative not only was the person entitled on the tenant's death before the Act, but as a person who had obtained a good title against the lord. Under the law as it was before the recent legislation that person would have had to pay a fine to obtain such a title, and I must therefore treat the defendant as in the same position as if he had obtained admittance upon the death of the copyholder in fee. That is the true effect of s. 128. It was intended to save for the lord all those fines to which he would have been entitled if the Act had not come into force until the expiration of 10 years, or until the compensation had been agreed and paid.

Before the Act came into force the death of the copyholder in fee would not in itself have given rise to a liability to a fine, except in the sense that if admittance was not sought and the fine was not paid, then the lord was in a position to seize the land quousque. That method of enforcing payment, if such it was, has been taken away from the lord, but the Legislature did not, in my judgment, intend to deprive him of the fines to which he would have been entitled by reason of the copyholder's death and the subsequent admittance of his devisee or heir.

The result of the defendant's argument would be that the Act would have deprived the lord of the fines to which he would have been entitled under the previous law. The defendant as executor would not be bound to pay a fine at all, and if he sold the land the fine would only be payable on his conveyance. In that case the lord would only get the one fine on alienation, instead of getting as heretofore the two fines: (*a*) on admittance of the devisee or heir and (*b*) on alienation by him.

The effect of the Act is that I must treat the defendant as in the same position that the devisee or heir would have been under the old law if he had obtained admittance and consequently been obliged to pay the fine. There is nothing in s. 129 or any other section contrary to this conclusion. It may well be that if the defendant assents to the devise before he has adopted either of the methods for obtaining the extinguishment of fines under s. 138 a second fine will be payable in the assessment under s. 129. But the defendant has his own remedy against that, because by giving notice under s. 138 future fines can be avoided.

The result is that the defendant is liable to pay the fine. In my judgment he is in the same position as the devisee or customary heir who has got a good title against the lord, and is liable to pay the same fine that the devisee or heir would have been liable to pay had he obtained admittance and thereby completed his title.

I therefore answer question 1 in the affirmative, and the defendant must pay the costs.

Solicitors: *Burn & Berridge, for R. E. Tucker, Solicitor to the Duchy of Cornwall; Reynolds, Sons & Gorst.*

G. R. A.

In re CITY EQUITABLE FIRE INSURANCE COMPANY, LIMITED (2.).

[0048 of 1922.]

C. A.
1930
MAUGHAM J.
April 4, 7.
C. A.
June 17, 18.

Company—Winding-up—Mutual Dealings—Treaty of Reinsurance—Deposit for specific Purpose—Surplus—Set-off—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 31—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 107.

By a treaty of reinsurance dated April 13, 1920, between two insurance companies, the reinsurer accepted a share of all insurances accepted by or renewed by the insuring company in its fire department. By Art. VIII. of the treaty the insuring company was entitled to retain and accumulate out of money due to the reinsurer a sum equal to 40 per cent. of the share of all premiums credited to the reinsurer in the first year, this sum to remain as a deposit to secure the due performance of the reinsurer's obligations. The insuring company was to be entitled to retain the deposit, or any balance remaining after satisfying any obligation in respect of which the reinsurer might make default, until the determination of the agreement, paying the reinsurer interest at 3½ per cent. per annum on any part of the deposit not used in manner aforesaid. By Art. IX. the agreement was immediately determinable by notice on the reinsurer going into liquidation. On January 31, 1922, the reinsurer presented its own winding-up petition, and on February 1, 1922, the insuring company gave notice determining the agreement. On February 14, 1922, a compulsory order was made for the winding up of the reinsurer. After all obligations under the treaty had been satisfied, there remained in the possession of the insuring company a sum of over 8000*l.* out of the deposit and a sum of accrued interest. The liquidator of the reinsurer took out a summons for a declaration that the insuring company was bound to pay over the deposit and interest in full. The insuring company claimed to be entitled to set them off against sums due to it from the reinsurer under other treaties and policies of insurance and reinsurance:—

Held, (1.) that the interest was a debt due from the insuring company to the reinsurer and fell therefore within s. 31 of the Bankruptcy Act, 1914, as being one of a number of mutual credits or debts arising between the parties, and that there was therefore a right of set-off in regard to it.

(2.) (affirming Maugham J.) that the deposit being money handed over to the insuring company for a specific purpose, the balance remaining after satisfying the specific purpose continued to be excluded from the course of account between the parties and could not be the subject of a set-off.

In re Pollitt [1893] 1 Q. B. 455 and *In re Mid-Kent Fruit Factory* [1896] 1 Ch. 567 followed.

SUMMONS.

By a treaty of reinsurance dated April 13, 1920, and made between the Liverpool and London and Globe Insurance

Company, Ld. (hereinafter called "the Globe"), of the one part, and the City Equitable Fire Insurance Company, Ld. (hereinafter sometimes called "the Reinsurer"), of the other part, the Globe ceded and the Reinsurer accepted and guaranteed by way of reinsurance a share as therein stated of all surpluses on insurances and/or reinsurances accepted or renewed by the Globe in its fire department on the risks therein mentioned.

The treaty provided (inter alia) as follows:—

Art. VIII., para. 1: "The Globe shall be entitled to retain and accumulate out of any moneys due to the Reinsurer a sum equal to 40 per cent. of all premiums credited to the Reinsurer in respect of the first twelve months of this agreement. The said accumulations (hereinafter called 'the said deposit') shall remain in the hands of the Globe as security for the due performance of the obligations of the Reinsurer under this agreement. The said deposit shall be maintained at a sum equal to forty per cent. (40 per cent.) of the premiums credited to the Reinsurer during the twelve months preceding the date to which each subsequent quarterly account is made up, and the Globe shall be entitled to retain any premiums payable to the Reinsurer for the purpose of increasing the said deposit to the required amount."

Para. 2: "The Globe may at any time after default by the Reinsurer in payment of any sum owing by the Reinsurer to the Globe under this agreement by notice in writing addressed to the Reinsurer require the Reinsurer to pay to the Globe the sum so owing. If the Reinsurer shall not pay such sum within seven days of the receipt of such notice, the Globe shall be entitled to take so much of the said deposit as may be required to provide the sum in respect of which default shall be made. The Reinsurer shall replace any sum so taken as aforesaid. The Globe shall pay to the Reinsurer interest at the rate of three and one half per cent. (3½ per cent.) per annum on any part of the deposit not used in manner aforesaid."

Para. 3: "The Reinsurer shall not be entitled to the return of the said deposit or any balance thereof until the determination of this agreement and the satisfaction by the Reinsurer of all obligations (actual or contingent) hereunder."

Para. 4: "The Globe may at its discretion, instead of taking any part of the said deposit, require the payment of any sum in respect of which default shall have been made, and it shall be no defence to any such claim that the Globe might have recourse to the said deposit."

Art. IX., para. 1: "This agreement shall take effect on and from the fourteenth day of April One thousand nine hundred and twenty."

Para. 2: "Either party shall at any time be at liberty to terminate this agreement by giving three months' notice in writing by registered letter to the Globe at No. 1 Dale Street, Liverpool, England, or to the Reinsurer at 3/4 Lothbury, London, E.C. 2, such notice to expire on March 31, June 30, Sept. 30, or Dec. 30, in every year."

Para. 4: "Should at any time the Reinsurer:—(*a*) Lose the whole or any part of its paid up capital, or (*b*) go into liquidation or a receiver be appointed, or (*c*) be acquired or controlled by any other company or corporation, the Globe shall have the right to terminate this agreement forthwith by giving notice in writing by registered letter to the Reinsurer at the address mentioned in paragraph 2. . . . ."

Para. 6: "On the termination of this agreement from any cause whatever, the liability of the Reinsurer under current cessions shall continue in full force until their expiry, unless the Globe shall, within one calendar month of giving or receiving notice to determine this agreement, or within one calendar month of the event determining this agreement, elect to withdraw the existing cessions. In such event the Globe shall debit the Reinsurer with a sum equal to 35 per cent. of the amount credited to the Reinsurer for premiums under this agreement (except as regards Canadian business when the percentage shall be 47½ per cent.), as appearing in the previous four quarterly accounts which it is agreed shall be regarded as the equivalent of the Reinsurer's liability for risks unexpired at the date of such determination. No refund of commission shall be allowable on the amount so debited."

On February 14, 1922, a compulsory winding-up order was made against the Reinsurer, on a petition presented in January, 1922, and the Senior Official Receiver was appointed liquidator. By notice in writing dated February 1, 1922, the Globe had terminated the said treaty as from that date (in accordance with para. 4 of Art. IX. of the treaty) and had also given notice that all existing cessions were cancelled and withdrawn, and that the Reinsurer was being debited in account with a sum calculated in accordance with para. 6 of Art. IX. in respect of risks unexpired at that date. After all obligations, actual or contingent, under the treaty had been satisfied, there remained in the hands of the Globe a balance of over 8000*l.*, representing the balance of the deposit retained and accumulated by the Globe under the treaty, and a sum of about 1800*l.*, representing interest accrued upon the deposit. The Globe claimed to be entitled to set off balances due from the Reinsurer under other treaties, contracts, and policies of insurance and reinsurance against the balance of the deposit and the interest: and by this summons the official receiver and liquidator asked for a declaration that upon the true construction of the treaty the Globe was bound to pay over to him in full the moneys representing the balance of the deposit and the balance of the interest accrued on the deposit after satisfying all obligations of the Reinsurer under the treaty.

C. R. Dunlop K.C. and *L. W. Byrne* for the official receiver. The question of law is covered by *In re Mid-Kent Fruit Factory.* (1) It is not suggested that there was any consent to the balance remaining in the hands of the Globe for any other purpose; it appears from the agreement that the deposit was created for the specific purpose of being a security for the due performance of the obligations of the Reinsurer under the agreement of April 13, 1920. The balance remaining after satisfaction of all obligations due from the Reinsurer to the Globe under the treaty is held in trust for the liquidator, and the contract ousts the application of s. 31 of the

(1) [1896] 1 Ch. 567.

Bankruptcy Act, 1914. The question is whether the principle in *In re Mid-Kent Fruit Factory* (1) applies. In *In re H. E. Thorne & Son, Ld.* (2), the law was reviewed by Astbury J. That was a special case in which the principle in *In re Mid-Kent Fruit Factory* (1) was reaffirmed, but was held to be not applicable to the special facts.

Lionel Cohen K.C. and *Sir Albion Richardson K.C.* for the respondent company. The payment of money for a specific purpose is not part of mutual dealings, but where money is deposited as a mere security for the performance of obligations and the security is realized before the commencement of the liquidation and a surplus remains after satisfying the obligations any other liability of the company can be set off against this surplus, provided that the liability existed at the commencement of the liquidation. The security must be in the form of money at the commencement of the liquidation : *Eberle's Hotels Co.* v. *Jonas.* (3) *In re Mid-Kent Fruit Factory* (1) decided that it would have been a breach of the express contract to claim a set-off, as the money was paid for a specific purpose. The Reinsurer's claim arises out of the express terms of the treaty. On the contract this is not really a case of constituting a trust fund ; it is not like a case where the money is deposited with a bank in joint names, or where a trust fund is constituted with provisions for investment and payment of the income of the investment to a reinsurer ; this is really a loan by the Reinsurer to the Globe, on which the Globe has to pay interest at 3½ per cent., with a provision that it cannot be called in until the Globe is paid off.

[*In re Pollitt* (4) ; *Charles* v. *Jones* (5) ; and *In re Daintrey* (6) were referred to.]

C. R. Dunlop K.C. in reply. The case is on all fours with *In re Mid-Kent Fruit Factory* (1), but in order to see what principle ought to be applied it is necessary to see what the contract provides. Art. VIII. created a trust, and the deposit is clearly created for a particular purpose, not to satisfy the

(1) [1896] 1 Ch. 567.
(2) [1914] 2 Ch. 438.
(3) (1887) 18 Q. B. D. 459.
(4) [1893] 1 Q. B. 455.
(5) (1887) 35 Ch. D. 544.
(6) [1900] 1 Q. B. 546.

balance of debt that may arise out of this and other treaties, but to meet obligations under this treaty only. *In re Pollitt* (1) has never been questioned. There money was handed to a solicitor to meet a claim to future costs, because he declined to act until provided with money in advance. There was no evidence that he paid it into a separate banking account or earmarked it as a trust property. What mattered was that it was handed to him for a specific purpose. The principle was applied in *In re Mid-Kent Fruit Factory* (2) and is there stated by Vaughan Williams J. *In re H. E. Thorne & Son, Ld.* (3), did not purport to lay down any different principle; it merely decided that *In re Mid-Kent Fruit Factory* (2) and *In re Pollitt* (1) did not apply to the facts of that case. The learned judge distinguished those cases, because he treated the insurance moneys or the moneys yielded by the policies as being available in the hands of the creditor to satisfy the balance of a current account arising out of mutual dealings. *In re Mid-Kent Fruit Factory* (2) is a direct authority, and there is nothing in the other authorities to justify not giving effect to the principle there stated.

Maugham J. [having stated the facts:] In my view the matter is one which depends, so far, at any rate, as this Court is concerned, on the decided cases. The question, of course, is whether, under the mutual credit section of the Bankruptcy Act, imported into the winding up of a company which is insolvent—a description which certainly applies to the City Equitable—there is a right to make the set-off in question on the ground that the transactions to which I have referred have been in the nature of mutual credits, mutual debts, or other mutual dealings between the Globe and the City Equitable. In considering that point there are, I think, three authorities, and only three, to which I need refer. The first is *In re Pollitt* (1), which has the advantage of being a decision of the Court of Appeal. It related to an extremely small sum—namely, 15*l.*—given by a debtor to a solicitor whom he consulted. The debtor was already liable to the solicitor for

(1) [1893] 1 Q. B. 455.
(2) [1896] 1 Ch. 567, 570.
(3) [1914] 2 Ch. 438.

costs, and the latter naturally declined to act further unless he were furnished with money to meet further costs; and the debtor placed in his hands the sum of 15*l.* for the purpose of securing any costs that might be incurred in relation to an arrangement with pressing creditors. The solicitor called the debtor's creditors together and prepared a deed of assignment which the debtor executed. But unfortunately the arrangement fell through and the debtor was adjudged bankrupt, the act of bankruptcy being the execution of the deed of assignment. Then the trustee in bankruptcy applied for payment to him of the money in the hands of the solicitor, or the residue thereof, the amount of which, I think, was 12*l.* 3*s.* 4*d.* There was an application to the Divisional Court, who decided against the solicitor, and then the matter went to the Court of Appeal, consisting of Lord Esher M.R. and Lindley and A. L. Smith L.JJ. The ground of the decision of the Court of Appeal, which affirmed the view of the Divisional Court, was that the money was given to the solicitor for a specific purpose—namely, that out of it the solicitor might retain his costs in relation to the work which he was about to do for the debtor. The Court of Appeal held that the money was given to him for that purpose and for that purpose only, and, accordingly, that the solicitor had a right to retain out of the 15*l.* his proper charges for the work which he did after the date of the payment of the 15*l.*, but was not entitled to retain any part of the 15*l.* in respect of professional services rendered before the money was placed in his hands. As I understand it, the true meaning of the decision is that the circumstances of the case negative the contention that there were, in respect of the payment of 15*l.* and the other transactions between the parties, mutual credits, mutual debts, or other mutual dealings, that inference being excluded by the circumstance that the money was given to the solicitor for a specific purpose.

A somewhat similar case came before that most experienced judge in bankruptcy matters, Vaughan Williams J., in *In re Mid-Kent Fruit Factory.* (1) The headnote, which is quite

(1) [1896] 1 Ch. 567.

accurate, is as follows: "The characteristic of mutuality is still as necessary under the mutual credit clause of the Bankruptcy Act, 1883, as under the mutual credit clauses of prior Bankruptcy Acts, in order that a set-off may be claimed. Where moneys of a company are paid to a person for certain specified purposes, and after those purposes are satisfied a balance remains with the payee, he cannot, if a winding-up takes place, set off a debt owing to him by the company unless he can show that the balance was retained by him with the consent of the company." This again was a case between client and solicitor. Certain solicitors acted for the Mid-Kent Fruit Factory from its formation to the commencement of the winding-up, and the company owed them for their services costs which were fixed at 325*l.* The solicitors also had a sum of 93*l.* 19*s.*, the balance of certain moneys given to them by the company with instructions to settle certain claims by pressing creditors. The report states that the cheques in question, which were given in January and February, 1892, were given for the purpose of paying certain pressing creditors in full, in case arrangements could not be made with the whole of the creditors. In those circumstances the question arose on the winding-up whether the solicitors could set off the costs due to them against the balance of 93*l.* 19*s.*, and quite naturally *In re Pollitt* (1) was relied upon. The learned judge found as a fact that there was no evidence to show that the company consented to the balance of the money remaining in the hands of the solicitors. That was an important finding from his point of view; then he proceeded to consider the law of mutual credits and mutual dealings, and he held on an elaborate consideration of the matter that the necessity for mutuality had not ceased to exist. Then he says (2): "The present claim of these solicitors to retain the moneys does not arise out of contract at all. It is a claim to retain moneys, which were put into their hands for a specific purpose, for another purpose which was in no wise contemplated by the contract of bailment." And, on the next page: "Having said that, I do not think it is necessary to say more than that in my judgment there can be no set-off in this case, because the money was received under a contract of bailment which allotted the money and necessitated the application of it to a specific purpose, and that bailment was never determined, and neither the company nor its liquidator ever consented to the money being held for any purpose other than the one for which it was originally intended."

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(1) [1893] 1 Q. B. 455.

(2) [1896] 1 Ch. 567, 571, 572.

Those cases have been carefully considered by Astbury J. in *In re H. E. Thorne & Son, Ld.* (1) The facts there are somewhat singular, and need careful studying. Company A had considerable mutual business dealings with Company B, and in the course of these dealings Company A borrowed money from Company B, on two bills of sale charging certain machinery and providing for its insurance against fire. The machinery was insured in the name of Company B, the premiums being charged to Company A. The machinery was destroyed by fire and Company B received the sum of 1600*l.* insurance money. The date is material, because the money was received on September 9, 1910, and it was not until about a fortnight later, September 23, that the company was wound up voluntarily in pursuance of a special resolution. At the date of the winding-up 744*l.* remained due on the bill of sale, with the result that Company B had at the date of the winding-up a surplus of some 856*l.* insurance money in hand after deducting the debt. On the other hand Company A owed Company B some 2000*l.* odd on unsecured book debts. The matter came before Astbury J. on a claim by Company B to set off the 856*l.*, the surplus of the insurance money in their hands, against the 2000*l.* book debts. Astbury J. in his judgment goes through all the cases which had been cited to him, and he accepts, as he would be bound to accept, the decisions in *In re Pollitt* (2) and *In re Mid-Kent Fruit Factory* (3) as being perfectly correct, and as being binding upon him. He states the principle of those two cases in these terms (4): "Now the principle of those two cases is that where a creditor obtains money or has in hand a balance of

(1) [1914] 2 Ch. 438.
(2) [1893] 1 Q. B. 455.
(3) [1896] 1 Ch. 567.
(4) [1914] 2 Ch. 438, 450.

money paid to him under a separate contract for a specific purpose he cannot and ought not to be allowed to claim a set-off under s. 38 if it involves a breach of the contract under which he obtained the money." With great respect, I doubt very much if anything is added to the proposition by the words "if it involves a breach of the contract under which he obtained the money." I doubt very much whether anything more is needed than what is said to be the ratio decidendi in *In re Pollitt* (1)—namely, the proof that the creditor obtained the money from the debtor for certain specified purposes and was claiming to retain the balance after those purposes were satisfied. Reference to a breach of contract may be a little misleading, because of course when one person hands money to another there is a breach if the money is not repaid in due course; and I am not inclined to travel beyond what was said in *In re Pollitt* (1) as the reason for the decision.

Astbury J. then proceeded to distinguish those cases on the ground that in the case before him the respondents to the summons, namely, Company B, received the 856*l.* not on a realization of their security in the ordinary way, but by reason of the security having been destroyed by fire and the policy moneys coming to their hands in those ways. He says, further (2): "About a fortnight before the winding-up, the respondents received the policy moneys, and after satisfying the balance due to them on the bills of sale they had 856*l.* in hand which they claim to deal with in their account against the company having regard to their general dealings and transactions. There was clear mutuality. It was a debt from them to the company. They owed the company 856*l.* The company owed them 2099*l.* contra in relation to the general dealings." Then he refers to *Eberle's Hotels Co.* v. *Jonas* (3), and cites some passages from the judgments of Lord Esher M.R. and Fry L.J., and, having regard to the findings that I have read, came to the conclusion that the claim to make a set-off was a just claim. I

(1) [1893] 1 Q. B. 455.
(2) [1914] 2 Ch. 438, 451.
(3) 18 Q. B. D. 459.

should add that he distinguishes some remarks of Fry L.J. in *Eberle's Hotels Co.* v. *Jonas* (1) by saying (2): "Fry L.J. was here dealing with the question of tacking an unsecured debt to a security existing at the time of the liquidation, and I do not think he was dealing at all with a case where the security had been put an end to and the secured debt paid before the liquidation, and the creditor had a surplus in hand which apart from the question of s. 38 he would clearly have had to return to his debtor."

It is clear to me that the decision in *Eberle's Hotels Co.* v. *Jonas* (1) is not to be regarded in any way as overruling or qualifying the decision in *In re Pollitt* (3), which was, of course, a later decision, and one in which Lord Esher M.R. and Lindley L.J. took part.

I turn now to clause 8 of the treaty of reinsurance, and I must point out that in my view the moneys which the Globe were entitled to retain and accumulate must be taken to be moneys left in the hands of the Globe for a specific purpose. I derive that from the circumstance that the accumulations are stated to remain in the hands of the Globe as security for the due performance of the obligations of the Reinsurer under the reinsurance treaty. That is fortified by the circumstance that the Globe, after default by the Reinsurer, could not take any part of the deposited funds without giving a notice in writing addressed to the Reinsurer, and unless default was made by the Reinsurer in paying the sums owing by the Reinsurer to the Globe. Sub-clause 3 of Art. VIII. seems to me to show beyond reasonable doubt that on the terms of the agreement the Reinsurer, the City Equitable, was to be entitled to the return of the deposit or any balance thereof upon the determination of the agreement and the satisfaction by the City Equitable of all obligations (actual or contingent) thereunder. It does not seem to me to matter much whether it is or is not regarded as a trust fund. It is, to my mind, moneys "deposited for a specific purpose" with the Globe, as much, at any rate, as were the moneys in *In re Pollitt* (3) and *In re Mid-Kent Fruit Factory.* (4)

(1) 18 Q. B. D. 459.
(2) [1914] 2 Ch. 438, 453.
(3) [1893] 1 Q. B. 455.
(4) [1896] 1 Ch. 567.

I hold that those decisions, which are binding on me, dispose of the present case, and I must accordingly declare that on the true construction of the treaty the Globe is bound to pay over in full to the Official Receiver and liquidator the balance of the deposit retained and accumulated by it under the treaty, and the balance of the interest.

K. R. A. H.

C. A.

The Globe appealed. The appeal was heard on June 17, 18, 1930.

Lionel Cohen K.C. and *Sir Albion Richardson K.C.* for the appellant. The Globe is entitled to set off a sum of about 4000*l.* owing to it by the City Equitable against the sum of over 8000*l.* owing by it to the City Equitable, being the balance of the deposit under the reinsurance treaty of April 13, 1920, after satisfying all the obligations to it of the City Equitable in respect of that treaty. It is submitted that nothing amounting to a trust fund was constituted by Art. VIII. of the treaty and that the Globe is merely a debtor to the City Equitable in respect of this balance. If so these were "mutual dealings" between the Globe and the City Equitable within s. 31 of the Bankruptcy Act, 1914, and there can be a set-off. The section was framed to prevent the injustice of the creditor of a bankrupt having to pay his debt to the bankrupt in full, while being left to prove for what the bankrupt owed him. It is made applicable to insolvent companies by s. 207 of the Companies (Consolidation) Act, 1908. There is a strong tendency to construe s. 31 "extensively rather than restrictively, or, in other words, to favour the setting up of cross demands by and against bankrupts": Lindley on Partnership, 9th ed., p. 807; see also *Easum* v. *Cato.* (1) Maugham J. in deciding against this contention relied on the principle also laid down in Lindley on Partnership, 9th ed., p. 809: "Money in the hands of a creditor at the time of his debtor's bankruptcy given him for a specific purpose which has not been and cannot be carried out, cannot be set off against a debt due to him by the bankrupt if the set-off would involve a breach of the

(1) (1822) 5 B. & Ald. 861, 867.

contract under which the money was given to him; the same rule applies to any balance which may be in his hands after the specific purpose has been carried out, unless the debtor before his bankruptcy has consented to the creditor retaining it." In this connection a distinction has to be drawn between the balance of the deposit and the interest accrued on it. The last part of Art. VIII., para. 2, deals with the interest, and shows that it is a mere debt from the Globe to the City Equitable. There is therefore a right of set-off in respect of the interest.

The position in regard to the balance of the deposit is more difficult. The principle stated above is based on *In re Pollitt* (1) and *In re Mid-Kent Fruit Factory.* (2) In the former case money had been paid by the bankrupt to his solicitor for a particular purpose which failed, and it was held that the solicitor must repay it. It was an isolated transaction and not part of mutual dealings between the parties. In *In re Mid-Kent Fruit Factory* (2) money was handed to solicitors for the purpose of paying the debtor's creditors. Vaughan Williams J. held that the solicitors could not set off a surplus in their hands against their claim against the debtor for costs, because the money paid to them was received under a contract of bailment and the bailment had not determined. Here however the contract between the parties is not one of bailment. This present case is really covered by *In re H. E. Thorne & Son, Ld.* (3), which it is submitted was rightly decided. *Eberle's Hotels Co.* v. *Jonas* (4) also supports the appellants' contention. There the set-off was not allowed because it was a claim to set off incommensurable things. No such difficulty arises here.

C. R. Dunlop K.C. and *L. W. Byrne* for the respondent. The deposit was a retention fund, and its retention was allowed for a specific purpose. It was a trust fund applicable for a specific purpose under Art. VIII. The principle of *In re Pollitt* (5) and *In re Mid-Kent Fruit Factory* (2) is

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(1) [1893] 1 Q. B. 455, 458.
(2) [1896] 1 Ch. 567.
(3) [1914] 2 Ch. 438.
(4) 18 Q. B. D. 459.
(5) [1893] 1 Q. B. 455.

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directly applicable to the present case and prevents a set-off. Maugham J. rightly said that these cases compelled him to hold that the surplus of the deposit must be handed over to the liquidator of the City Equitable. *In re Mid-Kent Fruit Factory* (1) definitely decided that where money has been clothed with a specific character and is not to be applied in any other way, the balance remaining after satisfying the specific purpose cannot be brought into a general account between the parties.

Unfortunately no argument was addressed to Maugham J. distinguishing between the deposit itself and the accrued interest; but it is contended that the learned judge was right to treat the interest as a mere accretion to capital—an accretion to the deposit which must be dealt with in the same way.

Lionel Cohen K.C. in reply. There is no ground for treating the interest as an accretion to the deposit. Art. VIII., para. 2, stated in terms what was to be done with the interest. On its retention it became a debt to the City Equitable and the right to set-off applies.

Again it was said that the deposit was a trust fund. This is not so on the construction of Art. VIII., which puts the Globe practically in the position of bankers for the City Equitable to the extent of the deposit. On that footing set-off would be proper. *Astley* v. *Gurney* (2) shows that the fact that money is received as a security for a particular liability does not prevent set-off as regards any balance remaining after satisfying the liability. *In re Mid-Kent Fruit Factory* (1) is not binding on this Court. It was distinguished in *In re H. E. Thorne & Son, Ld.* (3), in a manner applicable here. Parties cannot contract out of s. 31 of the Bankruptcy Act, 1914: *Ex parte Barnett.* (4)

Lord Hanworth M.R. This is an appeal from a judgment of Maugham J., who refused to allow a set-off in the liquidation now proceeding of the City Equitable Fire Insurance

(1) [1896] 1 Ch. 567.
(2) (1869) L. R. 4 C. P. 714.
(3) [1914] 2 Ch. 438.
(4) (1874) L. R. 9 Ch. 293, 295.

Company. The Liverpool and London and Globe Insurance Company, Ld. (which I will refer to as "the Globe"), had dealings with the City Equitable Fire Insurance Company, Ld. (which I will refer to as "the City Equitable") under a treaty of reinsurance dated April 13, 1920, and the Globe in the course of carrying out transactions under that treaty got into its hands a sum of money belonging to the City Equitable which was retained and accumulated in accordance with the treaty. On the other hand, there are sums due from the City Equitable to the Globe which arise outside this particular treaty of reinsurance, the amount of which it is unnecessary to discuss, because the parties here happily agreed that all questions of figures can be settled; but, as the learned judge points out, it appears that there were a number of other treaties, contracts, policies of insurance and reinsurance between these two insurance companies; and the Globe claims to be entitled not only to prove in the liquidation of the City Equitable for the balance due from the City Equitable under those other contracts, but also to be entitled to effect a set-off against the balance of the deposit. That is the question that arises for decision on this appeal.

The summons which came before Maugham J. placed two matters before the Court for decision. It was taken out by the liquidator of the City Equitable and asked to have it declared that the Globe was bound to pay over "(*a*) the balance of the deposit retained and accumulated by" the Globe "under the treaty, and (*b*) the balance of the interest from time to time accrued on such deposit after satisfying all obligations of the City Equitable under such treaty," and was "not entitled to set off against such moneys any money due from the City Equitable to the Globe under or by virtue of any other treaty, contract, or policy of insurance or reinsurance." In his judgment the learned judge determined that the Globe was bound to pay over in full to the official receiver the money in its hands representing (*a*) the balance of the deposit retained and accumulated by it under the treaty, and (*b*) the balance of the interest from time to time accrued on this deposit. It is fair to Mr. Cohen to take note that in the summons and in the order to which I have referred the balance accumulated by the Globe and the interest that accrued upon that accumulated sum are separately dealt with. Unfortunately, before Maugham J. no separate or special argument was directed to the question of interest. Mr. Cohen in his able argument, for which the Court is indebted to him, emphasized the distinction between these two sums, and he indicated that they had different qualities. The sums to which Maugham J. has referred being due to the Globe from the City Equitable in respect of other contracts, treaties and policies of insurance, the question is whether or not the Globe has a right of set-off in respect of these sums against the sum accumulated under the treaty of reinsurance of April 13, 1920, and the interest thereon.

The terms of that treaty must be examined somewhat closely. It is not a facultative treaty; it is a definitive treaty under which by Art. I. the Globe ceded and the City Equitable accepted and guaranteed by way of reinsurance a share of all insurances or reinsurances accepted or renewed by the Globe in its fire department. Art. III. provided that the Globe was to pay to the reinsurer, the City Equitable, the same rates of premium that it received, less stamp duty and/or brokerages, and under Art. VI. accounts were to be rendered quarterly by the Globe to the City Equitable after the close of each quarter. The accounts were to be confirmed by the reinsurer within fifteen days after they had been rendered, and the balance on either side was to be paid over immediately thereafter. Then comes Art. VIII. [His Lordship read para. 1 of Art. VIII.] It appears to us, upon the proper reading of that paragraph of Art. VIII., quite clear that the right of the Globe was to accumulate a sum which is by the terms of the Article specifically appropriated as security for the due performance of the obligations of the reinsurer under this agreement. The subsequent provisions secure the maintenance of that fund at a sum equal to 40 per cent. of the first year's premium, but it remains and exists as a fund for the security of the due performance of the obligation of the reinsurer under this agreement. Then comes para. 2 of the same Article. [His Lordship read the paragraph :] Let us consider the working of the two companies under this agreement. Let it be supposed that at the close of one of the quarters there was a sum due from the reinsurer to the Globe, but not paid. The Globe might then give notice in writing requiring the reinsurer to pay the sum so owing, and if the reinsurer did not pay it within seven days, then the Globe was to be entitled to dip into the deposit and to provide the sum in respect of which default had been made. Provision is thus made for the reimbursement to the Globe out of the accumulated fund of any sums which were due from the City Equitable to the Globe and in respect of which the City Equitable had made default in paying the Globe. The Globe having dipped into the fund and repaid itself, there was a consequential duty cast upon the City Equitable to repay the sum so taken from the fund. Para. 2 concludes as follows : "The Globe shall pay to the reinsurer interest at the rate of 3½ per cent. per annum on any part of the deposit not utilised in manner aforesaid." When one looks closely, therefore, at Art. VIII. it is clear that a distinction is drawn between the portion of the premiums which the Globe was entitled to retain as a deposit and the interest upon that sum which remains to the credit of the City Equitable and has not been utilized for the purpose of repayment upon any default by it. The interest is clearly and definitely directed to be paid "to the reinsurer." It is not to be credited in account or added to the accumulating fund. [His Lordship then read para. 3 of Art. VIII. and continued :] Then provision is made in para. 4 of Art. IX. for the determination of the agreement : "Should at any time the reinsurer (*a*) lose the whole or any part of its paid-up capital, or (*b*) go into liquidation or a receiver be appointed, or (*c*) be acquired or controlled by any other company or corporation, the Globe shall have the right to terminate this agreement forthwith by giving notice in writing" ; and on the termination of this agreement the liability of the City Equitable under current cessions is to continue in force unless the Globe elects to withdraw the existing cessions, and then the Globe can, by charging the reinsurer with a sum calculated at a flat rate, withdraw the cessions, withdrawing therefore their right to look to the reinsurer for any part of any loss. In fact what happened was that on January 31, 1922, the City Equitable presented its own petition for winding-up, and on February 1 notice was given, under the clause that I have just read, to determine the reinsurance treaty. On February 14, 1922, the winding-up order was made, and on January 15, 1930, this summons was issued.

It is not in question at the present time that the date to which one has to look in ascertaining whether there is a right of set-off under s. 31 of the Bankruptcy Act, 1914 (which applies to the winding-up of insolvent companies), is the date of the petition for winding-up, just as in the case of a bankruptcy it is the date of the receiving order. That was determined in *In re Daintrey* (1) by the Court of Appeal, when Lindley M.R. was presiding, and it has been recognized ever since. It is also clear from *Ex parte Barnett* (2) that, as stated by Lord Selborne (3), the right of set-off is not one which depends upon the volition of either party but upon "an absolute statutory rule." Sect. 31 of the Bankruptcy Act, 1914, is directory in form and requires that its terms should be put in force, with a consequent result that proof should only be made in respect of the balance of the account after there has been a set-off. The section says in terms that "The balance of the account, and no more, shall be claimed or be paid on either side respectively." The question that we have to decide is whether or not that principle of set-off under s. 31 applies upon the facts of the present case. Different considerations, in our judgment, apply to the accumulated fund and to the interest payable upon it.

I will deal first with the interest, a sum which I understand to amount to something like 1800*l.* That is a sum which under para. 2 of Art. VIII. arose as interest at the rate of 3½ per cent. upon the accumulations in the hands of the Globe and, following the terms of the reinsurance treaty, is the sum which the Globe shall pay to the reinsurer. It appears, therefore, to represent a debt due from the Globe to the City Equitable; and one can see no reason why it does not fall precisely within the terms of s. 31 as being a mutual credit or debt arising by reason of the relationship or nexus created between the parties by the reinsurance treaty. They were doing business the one with the other. There was to be payment on either side according as losses occurred or premiums were to be paid by the Globe to the City Equitable, and equally in the course of that business this 3½ per cent. interest became payable to the City Equitable. It seems quite clear that that is a debt which ought to be, and would be, brought into account between merchants, and so far as the interest goes it appears a plain case falling within the terms of s. 31. It is unfortunate that this point was not presented to Maugham J., and I should like to state quite explicitly that in overruling Maugham J. on this point we are dealing with a matter on which no argument was addressed to him, and which indeed was not brought to his attention.

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(1) [1900] 1 Q. B. 546.
(2) L. R. 9 Ch. 293.
(3) L. R. 9 Ch. 295.

I now turn to the more difficult question whether or not there is a right of set-off in respect of the fund accumulated under the terms of Art. VIII., para. 1. The principle of set-off was originally adopted in bankruptcy proceedings as far back as the reign of Queen Anne by 4 & 5 Anne, c. 17, and was continued by subsequent statutes in the reign of George II. and later, all of which are mentioned in the judgment which was delivered by Sir Nicholas Tindall in *Gibson* v. *Bell* (1), and set out at the end of the notes to *Rose* v. *Hart* (2) in 2 Smith's Leading Cases, 12th ed., p. 292. That principle has been distinctly widened and developed. It is suggested now that it has become so wide as to embrace almost all matters which ultimately end in sums of money being due inter se between a bankrupt or a company in liquidation and his or its creditors. To hold that would be to go too far. It has been quite explicitly explained in *Eberle's Hotels*

(1) (1835) 1 Bing. N. C. 743, 753.

(2) (1818) 8 Taunt. 499.

Co. v. *Jonas* (1) that the two items on either side must be commensurable and that where you have a claim to specific goods in detinue and a debt in money on the other side you cannot have a set-off. There are, however, some wide observations made in that case on which Mr. Cohen has relied. Different considerations apply where money has been handed over for a specific purpose and not treated as a mere item in accounts kept between the bankrupt and his creditors. Illustrations of money handed over for a specific purpose are to be found in *In re Pollitt* (2) and *In re Mid-Kent Fruit Factory.* (3) The effect of handing over money for a specific purpose appears from the cases to be that it is taken out of the course of accounts between the parties to be held, so to speak, in suspense between them, until that specific purpose for which it had been handed over has been completed; and even then it appears that the nature and quality of the specific purpose still attaches to the balance of the fund, if any, which remains in the hands of the depositee. The fund having been originally placed in the depositee's hands for the particular purpose, the nature and quality of that purpose still attaches to the balance of the fund unless and until there has been some subsequent agreement releasing it from that specific purpose. Indeed, it must in all cases be the balance of the fund which is in dispute in cases such as this. If the specific purpose had been carried out, then there can remain no question at issue between the parties as to that. It is only in respect of the balance not employed in a specific purpose that the rights of the parties can be canvassed to ascertain whether a right of set-off applies or not. The cases are plain upon this question. In *In re Pollitt* (2) Lord Esher, after dealing with the facts and showing that a sum of money had been given by the debtor to his solicitor for a specific purpose, says this (4): "There is this difficulty. If the money was given to the solicitor for a specific purpose, then, as between him and the bankrupt, there could not be a set-off; nor as between them could there be any mutual credit."

(1) 18 Q. B. D. 459.
(2) [1893] 1 Q. B. 455.
(3) [1896] 1 Ch. 567.
(4) [1893] 1 Q. B. 458.

Those words are clear. In *In re Mid-Kent Fruit Factory* (1) Vaughan Williams J., to whom every one would pay tribute as being a master in his knowledge of the bankruptcy law, not only decides the particular case, but also adds a few words as to the law as it then stood, as they might be useful in future cases. He had before him a case in which several cheques had been handed over to the solicitors of the company for the payment of specific debts. The argument was that the specific purpose had been exhausted (2), "that there was no longer any specific purpose to which the money was to be applied; and that from that time forward the money remained in the hands of the solicitors as a debt due to the company." That was the argument; but Vaughan Williams J. holds that "the onus is on the solicitors to show the company's consent to the money remaining in their hands; and I fail to find that the consent was given, or that the solicitors ever communicated to the company that they had the balance in their hands." Dealing therefore with the argument presented that with regard to this balance not needed for the specific purpose the quality and nature of the specific purpose ceased, he definitely holds that it did not, because, until there was an agreement or some arrangement between the parties that the original quality of the fund should be withdrawn, it remained and attached to the balance of the fund just as it had originally attached to the whole of the fund. After having decided that as a judge of first instance, he goes on to make the remarks which may be useful in other cases, and he holds that although the principle of set-off has been widened by the introduction of the words as to "mutual dealings" in the Bankruptcy Act, 1883, "still, the characteristic of mutuality must always be present." Then he cites a passage from the judgment of Lord Russell of Killowen, C.J. in *Palmer* v. *Day & Sons* (3), and he then deals with the matter in this way: "The present claim of these solicitors to retain the moneys does not arise out of contract at all. It is a claim to retain moneys which were paid into their hands for a specific purpose, for another purpose which was in no wise contemplated by the contract of bailment." He uses that term in order to show that there was a handing over of money to the solicitors for a specific purpose, and then he says this: "I do not think it is necessary for me to say more than that in my judgment there can be no set-off in this case, because the money was received under a contract of bailment which allotted the money and necessitated the application of it for a specific purpose, and that bailment was never determined, and neither the company nor its liquidator ever consented to the money being held for any purpose other than the one for which it was originally intended." That case has been cited in a number of other cases. Mr. Cohen was quite justified in saying it was the decision of a judge of first instance which was not binding on the Court of Appeal and that there are other cases which ought to be considered. It was his contention that the decision was substantially no longer the law. I have already paid a tribute to the learned judge who delivered the judgment. It must also be noted that that judgment was delivered on January 17, 1896, and that, so far as I know, it has never been disputed, still less overruled, although it has been considered in a great number of cases. It was considered in *In re Daintrey* by Wright J. (1); it was considered in *Tilley* v. *Bowman* (2) by Hamilton J., as he then was, who deals with it at some length; it was considered in *In re H. E. Thorne & Son, Ld.* (3), by Astbury J.; and it was considered in *In re City Life Assurance Co.* (4) by this Court when, as a matter of fact, I myself accepted it as good and binding upon us. After the long sequence of years which have passed since it was decided and the number of cases in which it has been referred to and followed, it does not appear to this Court to be possible, even if it were so minded, either to dispute or overrule the decision.

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(1) [1896] 1 Ch. 567.

(2) [1896] 1 Ch. 570.

(3) [1895] 2 Q. B. 618.

That being so, I come back to the actual terms of Art. VIII., and I find that its very words provide that the accumulated fund is to be held by the Globe as security for the due performance of the obligation of the reinsurer under the agreement; and following the decision of Vaughan Williams J., that quality, that nature of a security for the fulfilment of specific obligations, continues as to any balance no longer required for the purpose for which it was originally collected, unless and until some new contract is made in respect of it which frees the fund from that definite purpose of being security for the due performance of the obligations of the reinsurer under this agreement. There is before us no evidence of any such fresh agreement. The result is that the moneys so collected are still held by the Globe as security and are set apart from the ordinary current accounts between the Globe and the City Equitable. There can therefore be no set-off under s. 31 in respect of the balance of the fund not required for the purpose for which it was accumulated in the hands of the Globe. The result is that upon this point we agree with the judgment of Maugham J. and would answer the question with regard to the accumulated fund in the same way that he has done.

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(1) [1900] 1 Q. B. 546.
(2) [1910] 1 K. B. 745, 752.
(3) [1914] 2 Ch. 438.
(4) [1926] Ch. 191, 216.

The appellant succeeds on the question of the interest, but fails on the question of the accumulations. It is unfortunate that the question of the interest was not separately presented to Maugham J. At the same time, it was mentioned, as I have pointed out, in the summons and in the order, and it was open to the appellant to argue it in this Court.

In all the circumstances of the case, we think that the right course will be to allow the appeal on the question of interest, dismissing it on the other point, and that we should direct that there should be no costs on either side of this appeal.

Lawrence L.J. I agree and have nothing to add.

Romer L.J. I agree.

Order varied.

Solicitors: *Hair & Co.; William A. Crump & Son.*

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J.
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[1929. A. 2776.]

Local Government—Building Line—Premises fronting on Street—Ground Floor projecting beyond upper Floors—Alteration of Premises by Owners—Conversion of Ground Floor of Premises—" Front . . . . taken down in order to be rebuilt "—Meaning of word " front "—Claim to prescribe a Building Line—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 155.

The defendants, who had purchased two houses with the shops on the ground floors projecting towards the street on which the premises fronted a few feet beyond the exterior walls of the two upper floors, submitted to the local authority plans of some proposed alterations. These consisted in the main in the conversion of the two shops into one continuous shop with a single entrance from the street in a new position. The local authority took the view that the proposed alterations amounted to taking down the front of the premises for the purpose of rebuilding, so as to entitle them to prescribe a new building line under the Public Health Act, 1875, s. 155. They therefore refused to approve the plans and called on the defendants to set the ground floor front back to the existing exterior walls of the floors above.

The defendants having refused to comply, this action was brought on the relation of the local authority and the plaintiff moved for a declaration that the defendants were not entitled to build beyond the prescribed line and for an order on them to remove so much of the new front of the shop as projected beyond that line:—

Held (affirming the decision of Luxmoore J.), that the local authority had no power to prescribe a new building line under s. 155, because (1.) on the true construction of the section " the front " included the exterior walls of the two upper floors as well as the exterior wall of the ground floor, and (2.) in any case the alterations made to the premises did not amount to taking down the front of the ground floor.

Attorney-General v. *Hatch* [1893] 3 Ch. 36 considered.

MOTION.

By the writ the plaintiff, who was suing at the relation of the mayor and corporation of the County Borough of East Ham, claimed as against the defendants (a company called " Prices' Tailors (1928) Ld. " a declaration that the defendants were not entitled to erect the fronts of certain buildings known as 104 and 106 High Street North and situate in the county borough of East Ham, except in accordance with the line prescribed by the relators under the Public Health Act, 1875, s. 155.

The plaintiff also asked for an order directing the defendants to remove so much of the new fronts of the buildings as projected beyond the said line and an injunction restraining them from building beyond that line. By consent of all parties it was agreed to treat the hearing of the motion as the trial of the action.

The facts so far as material were as follows:—

The defendants, who carried on business under the name of "The Fifty Shilling Tailors," had recently purchased two shops in High Street North, East Ham, numbered 104 and 106 respectively. The shops constituted part of a block of shops on the east side of High Street North. Each shop consisted of a building of three stories, the ground floor, with a first and second floor above it. The ground floor of each shop projected a distance of 4 feet 3 inches beyond the line of the exterior wall (facing High Street North) of the first and second floors. In each case the projection was covered by a separate lead flat. The windows on the first floor were bow windows, but those on the second floor were level with the exterior wall. The defendants having bought the shops desired to alter them for the purposes of the business of tailors which they proposed to carry on there, and on September 16, 1929, they submitted to the East Ham Borough Council a plan showing the proposed alterations. The plan numbered 4633 by the Council showed that on the ground floor it was proposed to cut away the main wall dividing No. 104 from No. 106 and to support the portion remaining above the level of the ceiling of the ground floor by a steel girder, itself supported by two new steel columns. It also showed that certain existing openings were to be built up, whilst new openings were to be provided. The main alteration however was the throwing of those parts of the two shops nearest to High Street North into one continuous shop, with a shop front with an opening from the street through the northern side of No. 104. The southern end of the ground floor projection of No. 104 was bounded by a wall, called a wing wall, 4 feet 3 inches wide and 11 feet 6 inches in height. The face of the wing wall in High Street

North was covered with imitation stone to represent a column, with an ornamental stone truss on the top. The dividing walls between Nos. 104 and 106, and again between Nos. 106 and 108, were finished in the same way. On October 1 the Works Committee of the Borough Council recommended that the plans should be disapproved, and this recommendation was adopted by the Council in due course.

On October 22 the Borough Council resolved that in pursuance of their powers under the Public Health Act, 1875, s. 155, a building line be prescribed for the building or rebuilding of all premises on the site in question by setting them back to the existing main wall of the floors above the ground floor. They however expressed their willingness to pay reasonable compensation to the owner or owners or other persons immediately interested. On October 23 the town clerk wrote to the defendants' solicitors saying that the Council's disapproval of the plan of the alterations had been given in pursuance of their powers under s. 155, as they desired the ground floor building line to be set back to the main wall above. On October 28 the defendants' solicitors replied, contending that the section was not applicable. They stated that the plans conformed in every respect with the Council's by-laws and asked for the Council's approval to these plans as being in accordance therewith. They also added: "As this matter is one of urgency to our clients we are compelled to say that unless the approval of our clients' plans is forthcoming by return of post our clients will on our advice proceed with their alterations to these premises, as they have done all they can to comply with your by-laws with regard to the same." On October 29 the town clerk replied as follows: "The Council are of opinion that your clients' proposals constitute the taking down in order to be rebuilt or altered of the front of their building as above under the Public Health Act, 1875, s. 155, and the Council have prescribed the main wall of the building as the new building line. The Council are, of course, perfectly willing to pay reasonable compensation. . . . . If however your clients desire to proceed they do so at their own risk." On

November 1 the defendants' solicitors wrote saying that they did not agree with this contention and that they would be prepared to accept service of any proceedings which the Council might wish to take against them. On December 3 the town clerk wrote informing the defendants that the Council had decided to make an application to the Attorney-General for his fiat for an action claiming an order for the removal of so much of the above building as was in front of the prescribed building line. There was some further correspondence, but notwithstanding the Council's decision the defendants proceeded with the work of carrying out the alterations. On December 10 it was agreed that the most expeditious way of dealing with the matter would be that the motion should be treated as the trial and brought before the Court. The real question in dispute was whether or not what had been removed was "the front" to which s. 155 related. (1)

F. K. Archer K.C. and *R. A. Glen* for the plaintiff. The real point here turns on the question what is the meaning of the word "front" in the Public Health Act, 1875, s. 155. We say that the front of the building is that part of it nearest the road. The section does not deal with the case of part of the front of a house being removed, but applies only to cases where whatever constitutes the whole of the front is removed. That is what has been done here. Where the ground floor projects beyond the upper floors and has a roof of its own, then it has a "front" of its own, and if this is taken down the local authority can prescribe a new building

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(1) Public Health Act, 1875, s. 155: "When any house or building situated in any street in any urban district, or the front thereof, has been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith.

"The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this Act."

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line, but only as far back as to be flush with the wall of the upper stories.

The alterations carried out by the defendants constitute a substantial taking down of the premises: *Attorney-General* v. *Hatch.* (1) The whole section is intended to give power to a local authority to prescribe a building line when the house or building in question has been taken down.

Spens K.C. and *Maurice P. FitzGerald* for the defendants. The ground floor rooms have been converted into one continuous shop and the front of this shop is not a "front" within the meaning of s. 155: *Attorney-General* v. *Hatch.* (1) There are really three points: (*a*) What is the house or building, the front of which has been taken down? (*b*) What is the "front" of that house or building? and (*c*) Does what has been done amount substantially to taking down the front of this house or building? *Attorney-General* v. *Hatch* (2) assists our contention as regards (*a*) and (*b*).

These two houses have really only one front, even though the ground floor projects beyond the two upper floors. The alterations carried out by the defendants do not amount to a "taking down" of the building within the meaning of the section.

The section is equally one for setting forward as well as setting back a building line; it must be considered as a whole. The plaintiffs cannot succeed in their claim.

Archer K.C. in reply. The object of the section is to enable a local authority to set back a building in order to fix a prescribed building line, and the front of the building in this case must be the ground floor front.

LUXMOORE J. This is a motion which by the consent of the parties has been treated as the trial of the action. [His Lordship stated the facts:] It has been established that what the defendants have done with regard to Nos. 104 and 106 High Street North is to remove the main division wall on the ground floor of the premises throughout practically the whole depth of those premises so as to convert what were originally two separate shops into one shop. The lead has been stripped off the joists of the first floor where they project beyond the main exterior wall of the building and which with the lead covering and the boards immediately under the lead covering form the lead flat or roof over the ground floor projection. The wing wall on the south side of No. 104 has remained untouched, except that an artificial stone facing which was about 2 inches thick and the ornamental stone truss have been removed and the wall has been re-rendered in cement. The wing wall on the north side of 106 has also remained untouched. This wall is presumably a party wall and the southern longitudinal half of it would seem to be the property of the defendants. The glass windows and fascias over the two separate shops have been removed and the whole of the work has been completed. The ground floors of Nos. 104 and 106 facing High Street North present the appearance of one shop with a continuous fascia over it bearing the words, "The Fifty Shilling Tailors."

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(1) [1893] 3 Ch. 36, 39, 40.

(2) [1893] 3 Ch. 36, 45, 46.

The question which arises for decision is whether the relator Council has validly prescribed a building line which the defendants have transgressed. It is said that no building line has been prescribed under the Public Health Act, 1875, s. 155, inasmuch as the condition precedent to the exercise of the power to prescribe a building line has not been fulfilled, first, because the projection on the High Street North side of the ground floors of Nos. 104 and 106 does not constitute the front of either of the houses or buildings within the meaning of the section, and secondly, if the projection in question should be held to constitute the front of either house or building it has not in fact been taken down. The section is obviously a loosely drawn section. It replaces the Local Government Act of 1858, s. 35, which provided, so far as the material parts are concerned, that "Where any house or building has been taken down, in order to be rebuilt or altered, the Local Board may prescribe the line in which any house or building to be hereafter built shall be erected and the same shall be erected in accordance therewith. . . . ."

Sect. 155 of the Public Health Act, 1875, is as follows: "Where any house or building situated in any street in an urban district, or the front thereof"—those are substantially the new words which are added to the section—"has been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith."

As I have pointed out the main difference between that s. 155 and the Local Government Act, 1858, s. 35, is that the words "or the front thereof" have been added after the words "When any house or building" in the opening words of the sentence: "When any house or building situated in any street in an urban district, ... has been taken down." There is no definition in the Act of what is meant by "the front" of the house. Mr. Archer on behalf of the plaintiffs has argued that the "front" of the house or building in this section means that part of the house or building which actually abuts on the street. He admits that the question must always be one of degree, and says that in a case like the present where there is a ground floor projecting further into the street than the exterior wall of the floors above it, the "front" of the house is the exterior wall of the ground floor and nothing else. He seeks to support this argument by referring to the object of the section, that is the prescription of the building line. I am unable to accept this argument. Prima facie a house or building consists of all its floors. The exterior walls of the first and second floors are in the present case as much part of the front of the house as the exterior wall of the ground floor projection. If Mr. Archer's argument is right it is difficult to understand what the exterior walls of the first and second floors facing High Street North are to be called. It would certainly seem to me to be an abuse of language to call the exterior wall and shop window of the ground floor of Nos. 104 and 106 High Street North the "front" of those two houses to the exclusion of the exterior walls and windows of the first and second floors, and I therefore, quite apart from authority, come to the conclusion that the "front" of the houses Nos. 104 and 106 High Street North so far as s. 155 of the Public Health Act, 1875, is concerned includes the exterior walls and windows of the first and second floors of those houses as well as the exterior wall and windows of the ground floor.

I think however that this construction is in fact involved in the decision of the Court of Appeal in *Attorney-General* v. *Hatch.* (1) The facts of that case were different from the facts in the present case in this respect, that there the house consisted of three stories, the external walls of which facing the street were all in the same plane and no part of the walls on the ground floor or either of the other floors projected beyond the ground floor. The question to be determined was whether the taking out of so much of the external wall as reached to the top of the first floor, leaving the top floor untouched, was a taking down of the front of the house. It was held, reversing the decision of Kekewich J., that it was not a taking down of this nature, and consequently that the Council, although it had purported to prescribe a building line, had in fact failed to do so. As Lindley L.J. said in his judgment: "In order to bring the power given by this section into operation, it must be made out that the house or the front of it has been taken down. Now, can it be said that this house has been taken down ? I do not say that a house might not be considered to be taken down within the meaning of this section if only a few bricks were left standing ; but when a substantial portion, such as the whole top floor, is left untouched, I think that the house has not been taken down, and I do not think that any jury would find that it has. The defendant did not intend to take down his house, but to keep his house and alter the shop. A real substantial part of the house has been left standing, and I cannot come to the conclusion that the house has been taken down. Then as to the front, the defendant never intended to take down his front; he only intended to take out part of it. This is not a case of *de minimis non curat lex;* he left standing a substantial part, about one-third of the front. . . . . Now, unless the house or the front of it has been taken down the powers given by that section do not arise"—that is by s. 155—"the condition has not been performed, and it is immaterial that the defendant may have taken the course he has with a view to keep outside of the Act." Then he says that he cannot agree with the view that Kekewich J. had expressed that the house is to be considered as having been taken down. Lopes L.J. says the same thing. He says: "You must look to the house as it was, compare what has been taken down with what is left, and then decide whether the house or its front has in substance been taken down." Then on that test being applied to the case he came to the conclusion without any difficulty that the front of the house had not been taken down. A. L. Smith L.J. says that the "section cannot be brought into play unless the owner has taken down his house or the front of it. The section contains no such words as 'house or part of a house,' 'or front or part of the front,' the reason, as I apprehend, being because the Legislature did not intend the power given by the section to arise unless the whole house or the whole front of it was taken down. I agree that this means substantially taken down, and that if some small, insignificant part were left it should be held to be wholly taken down within the meaning of the section."

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(1) [1893] 3 Ch. 36, 45, 46.

Applying the tests laid down by the Court of Appeal in *Attorney-General* v. *Hatch* (1) to the present case how can I say that the front of this house has been substantially taken down unless I confine the front of the house to the ground floor? And for this purpose I will assume that what has been done is equivalent to the substantial taking down of the whole of the front of the ground floor. As I have already said I am unable to do this, and consequently on this ground I think that the requirements of the section have not

(1) [1893] 3 Ch. 36.

been complied with and that the council had no power to prescribe any building line. But assuming I am wrong in this view and that the ground floor in fact constitutes by itself the front of the house or building, a further question will then arise—namely, has that front been substantially taken down? In my opinion the answer to this question must be in the negative. The result of the alteration has really been to provide a new shop front to the two shops after they had been converted into one shop. The side walls at the north of No. 106 and at the south of No. 104 remain intact. The roof over the projection has only been dealt with to the extent of replacing a few of the boards over the joists and I think the whole of the old lead with new lead and by strengthening its supports by inserting a supplementary steel girder. The substantial alteration is a substitution of a new front window and a new entrance for the old shop windows and entrances. In my view, even if I am wrong on the first question, there has not been in fact any taking down of the front. The bones of the fabric have throughout the whole of the operations been left untouched and all that has been done is to supply them with a new covering. In the circumstances, I hold that the action fails with the usual consequences.

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The plaintiff appealed. The appeal was heard on June 23, 1930.

F. K. Archer K.C. and *R. A. Glen* for the appellant.

Spens K.C. and *Maurice P. FitzGerald* for the respondents were not called upon.

LORD HANWORTH M.R. These proceedings were taken by the Attorney-General at the relation of the local authority in order to restrain the defendants, Prices' Tailors (1928) Ld., from proceeding with some alterations that they were making to two houses which they had acquired—namely, 104 and 106 High Street North, East Ham. I need not recount the whole of the facts, which have been very fully and accurately stated by Luxmoore J., but the point involved is whether or not the local authority have the powers which they are seeking to enforce under s. 155 of the Public Health Act, 1875. The course of the proceedings was that after the writ had been issued on December 18, 1929, the question came before the Court on motion, and by consent the motion was treated as the trial of the action. Evidence was heard, and the learned judge came to the conclusion that the local authority were not entitled to the remedy they sought and he therefore dismissed the action with costs. From that decision the appeal is taken to this Court.

It is important to appreciate the facts on which the case was decided by Luxmoore J. Apart from his more careful appreciation of them, I will just state shortly those that are necessary for the purposes of the case. There is in High Street North, East Ham, a series of houses, the bottom parts of which are now turned into shops. It would seem that the houses were originally residential houses, but the ground floors have now been turned into shops and large window panes have been inserted. On the first floor there are bay windows which project from the main wall of the house.

In these two houses, Nos. 104 and 106 High Street, there was a projection on the ground floor which stood out towards the street a distance of 4 feet 3 inches beyond the main wall of the house. Although it is not certain, it is probable that that projection was a development from an original bay window which the house had on the ground floor at the time when it was built. However, these and other houses in sequence have these projections of 4 feet 3 inches beyond the main wall of the house, and on the first floor they have bay windows which project something like 3 feet or 3 feet 3 inches.

The defendants having acquired these shops were minded to turn them into one large emporium, and they have in fact now made a very attractive and large shop out of the two previous ones. While they were making these alterations correspondence took place in which the local authority said that they disapproved of the plans submitted for their approval by the defendants, and indicated that their reason for the disapproval was that they did not assent to the defendants replacing their premises so as to project on to the pavement, and were minded to set back the building line so as to prevent these projections. The defendants, however, quite fairly indicated their view that the local authority had no such power, and stated that they intended to proceed with the alterations without delay. On November 2 the Town Clerk wrote acknowledging the letter of November 1, in which the defendants had said that the Public Health Act, s. 155, did not apply to these proposals, and that they would be prepared to accept service of any proceedings. The local authority then took a little time for consideration, and it was not until November 28 that the Town Clerk wrote the letter in which he said that he had taken counsel's opinion, and that he had been advised that the powers of the Council as claimed by them were good, and that they would apply to the Attorney-General for his fiat to bring the action claiming an order for the removal of so much of the building as was in front of the prescribed line.

Comment was made that there was that delay of three weeks on the part of the local authority. I think it right to say that I do not think the local authority are justifiably subject to that comment. There must be a certain time taken by a public authority to ascertain their position by obtaining counsel's opinion and the like, and I do not think that this criticism upon them is well founded.

We have now to consider whether Luxmoore J. is right in the view which he took of the law applicable to the case and the facts as he interpreted them. It appears from the evidence which is before us that the defendants have not completely altered or pulled down the front part of the ground floor of their two houses; they have left standing on the north side, and in part on the south side, two columns with what is called a truss stone upon them. Between those two remaining and clearly marked definitive positions they have altered the fascia of their shops, and they have carried

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out some internal alterations with which the Court is not concerned.

It seems difficult, however, to say that they have in any way altered the permanent structure of the ground floor of their premises, however much they have altered the disposition of the windows and of the door affording an entrance to the premises.

The local authority claim that they had power to call upon the defendants to set back their building to the line prescribed on October 22. The building line is a line which is just 4 feet 3 inches back from the projections of the houses Nos. 104 and 106 on to the pavement.

Sect. 155 of the Public Health Act says this. [His Lordship read the section:] It will be observed that the right of the urban authority to prescribe a building line under this section arises when the house or building or the front thereof has been taken down. It is said by the defendants that the powers conferred by s. 155 are not operative in this case, because they have not taken down the house or building, or the front thereof. They say that all they have done is to alter a part of each of their houses abutting on the street. The local authority say: "Inasmuch as you have taken down the part abutting on the street, you have taken down the front for the purpose of the section, because the section means by 'the front' that which is abutting on the street."

We know that the old houses in London sometimes had forecourts or gardens in front of them, and in those forecourts or gardens one storied shops were often built, leaving the main part of the house standing as much as 40, 50 or 60 feet from the main pavement on which the shop abutted. It is quite unnecessary to consider such cases as that, because they do not arise upon the facts of this case. It is quite unnecessary to consider the problems which arise when the front of a shop abuts upon the pavement and at a considerable distance back, a house stands which is connected with the shop, but really stands at the other end of a forecourt in which the shop is built.

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In the present case we have premises of which the ground floor projects a few feet beyond the building line of the rest of the building, as also do the bay windows on the first floor; and the question is whether the front of this house has been taken down, within the meaning of the section, in the course of the alterations which the defendants have made to these two houses.

In *Attorney-General* v. *Hatch* (1), a case which is binding upon this Court, the Court of Appeal had to consider the effect and meaning of s. 155. Lindley L.J. (as he then was) said (2): "In order to bring the power given by this section into operation, it must be made out that the house or the front of it has been taken down." Then he puts the question: "Now, can it be said that this house has been taken down? I do not say that a house might not be considered to be taken down within the meaning of this section if only a few bricks were left standing; but when a substantial portion, such as the whole top floor, is left untouched, I think that the house has not been taken down, and I do not think that any jury would find that it has. The defendant did not intend to take down his house, but to keep his house and alter the shop. A real substantial part of the house has been left standing, and I cannot come to the conclusion that the house has been taken down. Then as to the front, the defendant never intended to take down his front; he only intended to take out part of it. This is not a case of *de minimis non curat lex:* he left standing a substantial part, about one-third of the front."

It is plain, I think, from that decision that the Court has to consider whether there has been a demolition of so large a portion of the house or the front of it as to justify one in holding that the house or the front of it has been taken down. "Taken down" does not mean merely remodelled, it means "removed." In the present case, as I have pointed out, the columns and truss stone at each end remain, and all that has been done has been some remodelling in the middle of the ground floor of the two houses, and the first floor and

(1) [1893] 3 Ch. 36.

(2) [1893] 3 Ch. 45.

the second floor have not been in any way touched. It seems quite impossible to hold that there has been a taking down of the front of the house, for certainly two-thirds of the front of the house have been left untouched.

It is, perhaps, of interest to look back at how the section has got to be what it is. Sect. 68 of the Towns Improvement Clauses Act, 1847, provided that houses which projected beyond the line of the street when they were taken down should be set back. That section began : "Where any house or building, any part of which projects beyond the regular line of the street," so that the powers of the section were limited to houses of which a part projected beyond the regular line of the street. That limitation was removed by s. 35 of the Local Government Act, 1858. In 1875 added power was given by inserting the words "or the front thereof." There are therefore far wider powers under the present section, but the power of the local authority under the present section to intervene and to trespass upon private rights can only be exercised where either the house or the front has been taken down.

Luxmoore J. in considering this matter came to some conclusions of fact which are of importance. He said : "It would certainly seem to me to be an abuse of language to call the exterior wall and shop window of the ground floor of Nos. 104 and 106, High Street North, 'the front' of those two houses to the exclusion of the exterior wall and windows of the first and second floor, and I therefore quite apart from authority come to the conclusion that on the true construction of this section 'the front' of the houses Nos. 104 and 106 High Street North, includes the exterior walls and windows of the first and second floors of those houses as well as the exterior wall and windows of the ground floor." With that view I quite agree. On the facts of this case I do not think it would be possible to come to any other conclusion, but I wish to point out that the decision does not necessarily cover the other case which has been suggested—namely, the case of an almost independent shop being built upon a forecourt.

Luxmoore J. has come to the conclusion that on the assumption that the front of the ground floor has been taken down that is not a taking down of the front of the premises within the meaning of s. 155, and he has also decided that what has been done to the front of the ground floor is not even a taking down of that front.

I agree with the finding of the learned judge, and with his construction of the section. It appears to me that he is right on both points, that in the present case "the front" of the house has not been taken down, and that substantially the front of the ground floor has not been taken down. The appeal must be dismissed with costs.

Lawrence L.J. I agree, and have nothing to add.

Romer L.J. I agree. Sect. 155 of the Public Health Act, 1875, is not dealing with a case where part of the front of the building has been taken down, nor indeed where the front of part of the building has been taken down, but with a case where the front of the whole building has been taken down. I can see for myself no reason whatsoever for thinking that the word "front" in s. 155 is used in the section in any other than its ordinary meaning. That being so, the first question that arises on the appeal is purely a question of fact—namely, has the front of the two houses been taken down? As to that I agree with Luxmoore J., that it would be an abuse of language to say that the front—the whole front—of the houses has been taken down.

On the other point referred to by the Master of the Rolls I have nothing to add. I would like, however, to point out that, supposing we had been able to accede to the contention of the appellants that "the front of the house or building" in the section means that part of the front of the building which is nearest to the street, the application of the section might have produced ridiculous results, for in such a case I can see nothing whatsoever to prevent the local authority from prescribing a building line for the ground floor which would be further away from the street than the line of the

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front of the first and second floors, and the result of that would be that if the building owner built in accordance with the new line, as he is obliged to do, the top part of his house would, or might, come tumbling down. I agree that the appeal should be dismissed with costs.

Solicitors: *Wilson & Blew; Gisborne & Co., for Carr, Sandelson & Co., Leeds.*

H. C. G.

EVE J.
1930
June 18.

In re ROBINSON.

LAMB *v.* ROBINSON.

[1930. R. 465.]

Will—Revocation—Gift of Annuity—Gift of absolute Interest to same Person by subsequent Will—Attestation of second Will by Wife of Legatee—Invalidity of Gift—Whether effective to revoke earlier Will—Intention of Testator—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 15.

The question whether a will has been revoked by a subsequent instrument depends entirely upon the intention of the testator as expressed in that instrument. The rule laid down in *Baker* v. *Story* (1874) 31 L. T. 631 and earlier cases that a second will will revoke an earlier one though it is ineffective to confer any gift, if such failure is due to the incapacity of the devisee or legatee, and not to any infirmity in the will itself, is no longer acceptable since the decision in *Ward* v. *Van der Loeff* [1924] A. C. 653.

A testatrix by a will made in 1914 gave her residuary estate upon trust to pay an annuity to her son H., and subject thereto for her grandchildren who should attain twenty-one. In 1921 she executed a document which she described as her last will, by which she gave the whole of her estate to H. absolutely, but it contained no clause revoking former wills. The later will was ineffective, though admitted to probate, owing to the wife of H. having attested it:—

Held, that the earlier will was restored, there being no intention shown by the testatrix in the later one to revoke it.

Baker v. *Story* 31 L. T. 631 not followed.

ORIGINATING SUMMONS.

The testatrix, Sarah Robinson, by a will dated November 20, 1914, appointed Horace Chapman sole executor and trustee thereof and devised bequeathed and appointed all her real and personal estate unto her trustee upon trust for sale and conversion, and after payment out of the proceeds of sale of her funeral and testamentary expenses and death duties to invest the residue and out of the income of the trust estate to pay an annuity of 156*l.* free of duty income tax and all other deductions to her son H. H. Robinson, and if the income was insufficient for the payment of the said annuity the deficiency was to be paid out of and be a charge upon the capital of the trust estate. The testatrix directed her trustee, after the death of H. H. Robinson, to stand possessed of the trust estate upon trust to pay and divide the same equally between such of her grandchildren, being children of her sons H. H. Robinson and Frank Robinson as should be living at the time of the death of H. H. Robinson, or of the testatrix in case her son predeceased her, and who should attain the age of twenty-one years.

On September 5, 1921, the testatrix executed a document which she described as her last will and testament, giving all her property to H. H. Robinson. This will is set out verbatim in the judgment of the learned judge. The will was attested by two witnesses, one of which was Gertrude Eleanor, the wife of H. H. Robinson. Horace Chapman, the executor named in the will of November 20, 1914, predeceased the testatrix, who died in February, 1929.

On February 15, 1930, administration to the estate of the testatrix with her will (treated as being contained in the two instruments of 1914 and 1921) was granted to the plaintiff and the defendant Harry Hewitt Robinson. This defendant had three children, of whom two were infants. His brother Frank Robinson named in the will of 1914 predeceased him, leaving one daughter, the defendant Dorothy Robinson. The estate of the testatrix was not sufficient to produce a clear annuity of 3*l.* a week to the defendant Harry H. Robinson without recourse to a charge upon capital. The summons raised the questions whether the testatrix was to be treated as not having effectually disposed of any part of her estate and her estate should be dealt with as if she had died intestate, or whether the dispositions in the will of

November 20, 1914, still applied to the estate, and had not been effectually revoked by the instrument of September 5, 1921, or how otherwise the estate of the testatrix ought to be dealt with.

J. A. Wolfe for the defendant Dorothy Robinson, a grandchild of the testatrix. The second will was intended to be in substitution for the first, and it fails not through any inherent defect of its own, but through the incapacity of the legatee to take. A distinction is drawn between these two cases, and where the will remains a valid will it effectively revokes any previous will containing provisions which are inconsistent with it: *Tupper* v. *Tupper* (1); *Baker* v. *Story*. (2) In the latter case there was no clause expressly revoking the former will, and Sir George Jessel held that it was unnecessary. He treated the case as covered by authority. In *Henfrey* v. *Henfrey* (3) the second will contained no appointment of executors, but being inconsistent with the first, and each disposing of the testator's entire property, it was held to be a revocation of the first and therefore entitled to probate. In *Ward* v. *Van der Loeff* (4) the testator made a codicil to his will containing a gift which was inconsistent with the substantive gift in his will but failed for remoteness, and the House of Lords held that the will was not revoked by the codicil. In that case the codicil was quite ineffective, here the second will is good, but the legatee cannot take under it.

Here the words "This is the last will and testament" are an implied revocation of the will.

[EVE J. referred to Jarman on Wills, 7th ed., pp. 156, 157, and 6th ed., pp. 169, 170.]

The decision in *Tupper* v. *Tupper* (1) has never been criticized in later cases. The present case is one of a second will, and not a codicil.

N. C. Armitage for the defendant H. H. Robinson. The words "This is my last will and testament" do not of themselves revoke a former will, they only mean "this is my final disposition." If the first will was revoked it ought not to have been admitted to probate.

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(1) (1855) 1 K. & J. 665.
(2) 31 L. T. 631.
(3) (1842) 4 Moo. P. C. C. 29.
(4) [1924] A. C. 653.

The decision in *Ward* v. *Van der Loeff* (1) has abolished the distinction between failure through infirmity of the instrument and failure through incapacity of the legatee to take under it which is found in *Tupper* v. *Tupper* (2) and other cases.

The rule now is that the mere fact that the second instrument is inconsistent with the first is not sufficient; there must be found in the second an express intention to revoke the first. The present is the converse case to *Baker* v. *Story* (3), where an absolute gift was cut down to a life interest, and was given in a way which became invalid.

[Eve J. referred to Theobald on Wills, 8th ed., pp. 834, 835.]

The authorities there referred to, and criticized, such as *Baker* v. *Story* (3), are not pertinent to the present case, which is governed by *Ward* v. *Van der Loeff* (1) and the Indian decision of *Vencatanarayana Pillai* v. *Subbammal.* (4) The mere inconsistency of the second will with the first is not sufficient to revoke the first. Here the first gave a large interest to the testatrix's son, but by the second she gave him the whole interest; she could not have intended that if the second gift failed for any reason, the earlier one should not take effect.

Wolfe replied, and referred to *Alexander* v. *Kirkpatrick.* (5)

Eve J. The testatrix Sarah Robinson died on February 18, 1929. By a will made on November 20, 1914, she in substance gave her estate to trustees upon trust for sale conversion and investment and directed them out of the rents and income thereof or if they should be insufficient then out of the capital to pay to her son Harry Hewitt Robinson an annuity of 156*l.* free of income tax, and subject thereto her trustees were to stand possessed of her trust estate upon trust for such of her grandchildren, children of her two sons H. H. Robinson and Frank Robinson, as should be living at the decease of H. H. Robinson, or in case he should die in her lifetime at her own decease and should attain the age of twenty-one years. The estate was of an insufficient amount to produce an annuity of 156*l.*

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(1) [1924] A. C. 653.

(2) (1855) 1 K. & J. 665.

(3) 31 L. T. 631.

(4) (1915) L. R. 43 Ind. App. 20; 32 Times L. R. 118.

(5) (1874) L. R. 2 H. L. Sc. 397.

On September 5, 1921, she executed a document in the following terms:—

"This is my last will and testament.

I, Sarah Robinson leave all I possess at my death to my son Harry Hewitt Robinson of 61 Grange Avenue, Leeds including the reversion I bought for him being his share under his late father's will. I wish him to have 100*l.* at once, the rest of his share as soon as possible after my death without any restrictions whatever.

(Signed) Sarah Robinson.

Witness: Gertrude Eleanor Robinson.
Mary Ann Tate."

Both documents have been admitted to probate, but, unfortunately, as the wife of the son Harry was one of the attesting witnesses to the second one the disposition therein contained is void.

In these circumstances the question is whether the first will was revoked by the later one, in which case the deceased died intestate, or whether the earlier will is still effective. Had I been called on to decide this question a few years ago I should have held that it was concluded by the decision in *Baker* v. *Story* (1), where it was held that the inconsistency of a gift in a second testament with a gift in an earlier one was a revocation of the earlier instrument although the second gift failed by reason of the incapacity of the devisee and not through any infirmity in the instrument. But on the most recent authorities it would seem to be in all cases a matter of intention. Has the testator evidenced an intention to revoke the earlier testament? And in arriving at an answer to that question it is immaterial whether the later testament fails to be operative through some inherent infirmity or by reason of the incapacity of the intended legatee to take under it. There is no distinction to be made between the two classes of case.

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(1) 31 L. T. 631.

Did the testatrix in the present case intend that, if the gift contained in the second will failed, the other gift should remain effectual? The only indication in the second document that the testatrix intended to revoke the first is in the altered disposition which it contained. Ought I to say that this was enough to indicate an intention to revoke? It is said that this is a will, not a codicil, but there is nothing in it to show that the testatrix remembered she had made a previous will. The point which has been raised is dealt with by Lord Dunedin in *Ward* v. *Van der Loeff* (1), where he referred to the distinction above alluded to and said: "I do not think this is a sound distinction. It would be curious if it were so. The question obviously depends on the intention of the testator as gathered from the words he has used, and it is difficult to understand how that intention can be varied accordingly as the inefficiency of the new arrangement depends on whether he has not legally carried out his intention by the words he has used or whether the law has made impossible the thing he was trying to do."

Lord Phillimore expressed the same view, and Lord Wrenbury, in an Indian case, *Vencatanarayana Pillai* v. *Subbammal* (2), dealing with *Baker* v. *Story* (3), came to the same conclusion that the matter depended on the intention. If the testator has made two distinct gifts to a person by two instruments it must be ascertained from the language of the two instruments whether the first gift has been altogether displaced. If there is a clear intention to revoke the earlier instrument the failure of the second gift will not restore the first one. In the face of the authorities I cannot hold that the first will has been revoked, so far as the estate of the testatrix is concerned.

Solicitors: *Warren, Murton, Miller & Foster, for Parker, March & Charlton, Selby.*

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(1) [1924] A. C. 653, 668.

(2) (1915) L. R. 43 Ind. App. 20; 32 Times L. R. 118.

(3) 31 L. T. 631.

H. L. L.

EVE J.

1930

June 20;
July 3.

In re TOWNSEND.

TOWNSEND *v.* TOWNSEND.

[1930. T. 519.]

Law of Property—Open Space—Private Railway Siding—Legal Ownership in undivided Spaces—Trustees of different Trusts—Rights of Access and User vested in Lessees, Licensees and Beneficiaries under Declaration of Trust—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Schedule I., Part V., para.* (2.).

A private railway siding consisted partly of freehold land, vested in the trustees of a will, and partly of leasehold land held for a long term by trustees of a lease containing a declaration of trust subsequently varied by deed. Neither set of trustees held upon trust for sale or had any power of sale. All rights of access to and user of the siding were vested, at the commencement of the Law of Property Act, 1925, in lessees of adjoining property, licensees, and other persons entitled under the declaration of trust, and rents were paid by all parties interested for such user:—

Held, that the siding was not an open space vested in undivided shares in right whereof each owner had rights of access and user thereof and did not therefore vest in the Public Trustee under para. (2.) of Part V. of Schedule I. of the Law of Property Act, 1925, but was vested in the respective sets of trustees upon the statutory trusts.

ORIGINATING SUMMONS.

Under the combined effect of the will dated August 12 and the codicil dated August 14, 1856, of John Townsend, all the residue and remainder of his real and personal estate was given to and became vested in his three sons, Joshua Townsend, John Townsend, jun., and Richard Townsend as tenants in common in equal shares, but subject to the payment of four rentcharges or perpetual annuities, one of 150*l.* to the testator's widow, Molly Townsend, another of 200*l.* to his daughter, Elizabeth Townsend, her heirs and assigns, and two of 150*l.* each to his sons Thomas Townsend and Paley Townsend, their respective heirs and assigns.

The testator died on August 28, 1856, and his will and codicil were duly proved by the executors named therein in the Consistory Court of the Bishop of Chester on November 24, 1856.

At the date of his death the testator was seised in fee simple of one undivided moiety of a small freehold estate, at or near

Rawtenstall, and Haslingden, Lancashire, his brother Richard Townsend being entitled to the other moiety. He also died seised of the entirety of certain copyhold lands, and he and his brother were also tenants in common of other copyholds of the manors of Accrington and Tollington. The testator also possessed certain leasehold property, and together with his brother was a tenant in common of other leasehold property, part of the manor of Accrington. By the custom of the above manors the copyhold tenants had an unrestricted right to demise for long terms up to 999 years, and the lessees of such terms were admitted as tenants of the manor. All the leasehold property above mentioned was of that description, the reversion being vested in copyhold tenants.

By a partition deed dated October 13, 1863, the undivided moiety of the testator's brother Richard in certain freehold, copyhold and leasehold properties and the entirety of certain other property therein described were conveyed by way of partition as to one equal undivided third part unto the use of Joshua Townsend, as to another third part unto the use of John Townsend, jun., and as to the remaining third part unto the use of Richard Townsend, so that the entirety became vested in the three co-owners subject to the annuities, and an indemnity was given by the co-owners to the other parties against the annuities.

In or about the year 1864 by agreement with the Lancashire and Yorkshire Railway (now the London, Midland and Scottish Railway), a private siding was constructed at Rawtenstall on land belonging to the railway company for the use of the co-owners, Joshua Townsend, John Townsend, jun., and Richard Townsend, whose land adjoined. The siding having been found to be inconvenient, by a lease dated September 1, 1892, John Townsend, jun., demised a piece of land to Richard Townsend for 999 years from July 1, 1888, at a yearly rent of 7*l.* 10*s.*, to extend and improve the siding (known as Townsend Fold siding), and it was further agreed that the said three co-owners (parties thereto), their heirs, executors and administrators, and the tenants and lessees of them or any of them, or any other person or persons whom they or their heirs and assigns might authorize in writing might use the siding, so that each person using the same should not unduly interfere with the user thereof by any other persons for the time being entitled to use it, and it was declared that the rents received should be applied in payment of the rent of 7*l.* 10*s.*, rates, taxes and outgoings, and subject thereto should belong to the co-owners in equal shares.

By a deed of variation dated October 21, 1901, made between the trustees of the will of Joshua Townsend of the first part, John Townsend, jun., of the second part, and the trustees of the will of Richard Townsend of the third part, the trusts of the siding declared by the lease were varied, and it was declared that the persons then using or entitled to use the siding were those set out in the schedule thereto, at the rents therein stated, and that the tenants of any other properties then belonging to the parties or any of them or of any other properties which they or any of them might acquire if and whenever they respectively should use the siding should pay in respect of each separate holding the rent of 15*l.* The siding now consisted of a line of rails entirely on land belonging to the railway company and two lines of rails chiefly on the leasehold portion of the siding and a roadway situate on both portions of the siding used to give access to road vehicles. The plaintiff and the defendant Harold Ashworth Townsend were the present trustees of the lease and the deed of variation. Immediately before the commencement of the Law of Property Act, 1925, the general estate, a moiety of which the testator, John Townsend, was entitled to at his death, including the freehold portion of the siding, was vested in the trustees of the will of John Townsend—namely, the plaintiff, the defendant, Harold Ashworth Townsend and Schofield Townsend, as joint tenants in fee as to the freeholds, and for an estate of inheritance to them and their heirs as to such part thereof as was of copyhold tenure, and as to such part thereof as was of leasehold tenure for the residue of the terms of years for which the same was held, and if derived out of a copyhold estate, according to the custom of the manor. The leasehold portion of the siding was then vested in the same persons as trustees upon the trusts of the lease and deed of variation. These trustees did not hold on trust for sale, nor had they any power of sale. Immediately before the commencement of the Law of Property Act, 1925, the persons entitled to use Townsend Fold siding were: (1.) the tenants of Wormstall Holme Bleachworks, part of the general estate; (2.) the tenants of three mills belonging to the trustees of the will of John Townsend, jun., who held upon trust for sale; (3.) John Longworth & Son, Ld., as owner and occupier of Clowes Mill, purchased from the trustees of John Townsend, jun.; (4.) the defendant, Mary Ann Townsend, as tenant of Brookfield House, part of the general estate; (5.) Schofield Townsend and others, as tenants of the Holme part of the general estate; (6.) Schofield Townsend and the trustees of the will of John Townsend for the receipt of materials required for use in connection with the general estate; (7.) the plaintiff by licence of Schofield Townsend and the said trustees for the purpose of receiving coal.

By a release dated February 19, 1930, the plaintiff and the defendant Harold Ashworth Townsend were appointed trustees of the annuities, which had become sub-divided and vested in various persons, in the place of the Public Trustee, and the annuity trustees at the request and by the direction of the annuitants released all the property subject thereto from the annuities and from all powers and remedies for recovering the same.

The trustees of the general estate, being desirous of selling parts of the estate, this summons was taken out to determine several questions of difficulty arising on the title by reason of the operation of the Law of Property Acts, 1922 and 1925. Eve J. held that the whole of the general estate, whether freehold, leasehold or enfranchised copyhold was vested in the trustees upon the statutory trusts at the date of the commencement of the Law of Property Act, 1925, and that no part thereof had become settled land within the meaning of that Act by reason of the then existence of the perpetual annuities. The question which alone calls for a full report was then argued—namely, whether the Townsend Fold siding

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was an open space which vested in the Public Trustee under para. (2.) of Part V. of the First Schedule to the Act of 1925, which is as follows: "Where immediately before the commencement of this Act, an open space of land (with or without any building used in common for the purposes of any adjoining land) is held in undivided shares, in right whereof each user has rights of user and access over the open space, the ownership thereof shall vest in the Public Trustee on the statutory trusts which shall be executed only with the leave of the Court, and, subject to any order of the Court to the contrary, each person who would have been a tenant in common shall, until the open space is conveyed to a purchaser, have rights of access and user over the open space corresponding to those which would have subsisted if the tenancy in common had remained subsisting."

Robert Peel K.C. and *Wilfrid Gutch* for the plaintiff. The siding is included in land which it is proposed to sell, and the purchaser has raised the question whether it is not an "open space" within para. (2.) of Schedule I., Part V. It is submitted that the case does not fall within the paragraph. The property in the private portion of the siding is vested in trustees, but the rights of user and access under the lease, which was also a declaration of trust, and the deed of variation are not vested in the owners as such, but in the lessees and other persons by virtue of the trusts declared by the lease. The effect of Part V. as interpreted by Tomlin J. in *In re Bradford City Premises* (1) has tended to make land to which it is subject unsaleable, and it must be construed narrowly. Part V. does not in any case apply to land the entirety of which is held by trustees. The rights of access and user referred to are only such as are held "in right" of the undivided shares in the land, and no others. Here the actual owners, as such, have no right to use the siding. The expression here used "held in undivided shares" should be contrasted with the wider words of Part IV.: "Where . . . . land is held at law or in equity in undivided shares vested in possession."

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(1) [1928] Ch. 138.

W. S. Norwood for the defendants (the remaining trustee and beneficiaries) supported the argument for the plaintiff.

Cur. adv. vult.

July 3. EVE J. The question on which I reserved judgment in this case is that numbered 4 in the summons which asks whether the land comprised in an indenture of lease dated September 1, 1892, and subject to the trusts contained therein and in a deed of variation dated October 21, 1901, or any part or parts thereof is vested in the Public Trustee as an open space under para. (2.) of Part V. of the First Schedule to the Law of Property Act, 1925. If it does the statutory trusts can only be executed with the leave of the Court.

That section, as construed by Tomlin J. (as he then was) in *In re Bradford City Premises* (1) must be read as follows: "Where immediately before the commencement of this Act any unbuilt upon space of land (with or without any building erected on it used in common for the purposes of any adjoining land) is held in undivided shares in right whereof each owner has rights of access and user over the unbuilt upon space of land the ownership shall vest in the Public Trustee on the statutory trusts which shall be executed only with the leave of the Court."

Without presuming to criticize the construction this puts upon the expression "an open space" or attempting to determine which, if any, of the various parcels of land enumerated in the evidence as possibly coming within that construction are in fact open spaces, I have come to the conclusion that no part of the land referred to in the specific question is an open space over which each owner has rights of access or user in right of his undivided share. The rights of access and user are personal rights under the trusts of the lease and the deed of variation.

Accordingly, I answer question 4 in the negative.

Solicitors: *Woodcock, Ryland & Parker, for Woodcock & Sons, Haslingden.*

H. L. L.

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(1) [1928] Ch. 138.

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In re WATSON.

CULME-SEYMOUR *v.* BRAND.

[1930. W. 2088.]

Will—Construction—Devise in strict Settlement—Shifting Clause—Estate Tail cut down to Estate for Life in certain Events—"Born in my lifetime or within due time after my death"—Period of Gestation—Name and Arms Clause.

By a will devising estates in strict settlement the testator declared that if any son of W. W. or M. C.-S. should be thereafter born "whether during my lifetime or within due time after my death" the estate in tail male therein devised to such son should not take effect, and in lieu thereof he devised the estates to the use of such son for his life, with remainder to the use of his first and other sons in tail male. The will also contained a name and arms clause requiring every person who became entitled to the possession of the estates as tenant for life or in tail to take and use the name and arms of W. upon pain of forfeiture to the next person entitled in remainder.

The testator died in 1899. The plaintiff, the eldest son of M. C.-S., was born in 1909, and on the death of W. W. without issue in 1925 became tenant in tail in possession subject to the effect (if any) of the above proviso cutting down estates tail to estates for life. Immediately after attaining the age of twenty-one years, in 1930, the plaintiff executed a deed disentailing the estates:—

Held, that the expression "within due time after my death" referred to the period of gestation. The plaintiff not having been born in the testator's lifetime or within nine months of his death did not come within the clause cutting down his estate tail to a life estate, and having duly disentailed the estates, was not bound to comply with the name and arms clause.

ORIGINATING SUMMONS.

The testator George Lewis Watson by his will dated June 19, 1899, appointed his brother Wentworth Watson, Francis Charles Le Marchant, and Arthur Richmond Farrer to be executors and trustees thereof and also trustees for the purposes of the Settled Land Acts. By clause 10 thereof the testator devised his Rockingham Castle estate and all other his freeholds to the use of Wentworth Watson for life with remainder to his first and other sons in tail male with remainder to the use of Michael Culme-Seymour (hereinafter called Admiral Culme-Seymour) the eldest son of his sister for his life with remainder to the use of his first and other sons successively in tail male with remainder to the use of Christabel Sarah Lavinia Watson for her life with remainders over.

By clause 11 of his will the testator declared that if any son or sons of the said Wentworth Watson or Michael Culme-Seymour (hereinafter called Admiral Culme-Seymour) should be hereafter born " whether during my life or within due time after my death " the estate in tail male devised to such son should not take effect, and in lieu thereof the testator devised the said estates to the use of such son for his life with remainder to the use of his first and other sons successively according to seniority in tail male.

By clause 12 of his will the testator declared that every person who became entitled as tenant for life or as tenant in tail male or in tail to the possession of the premises thereinbefore devised in settlement should within one year after becoming so entitled or if an infant within one year after attaining the age of twenty-one years take use and bear the name and arms of Watson, and apply for and endeavour to obtain the Royal Licence or take such other steps as might be requisite to authorize the user and bearing of the said name and arms, and if any person becoming so entitled should refuse or neglect within the time named to take use and bear the same or to take such steps as aforesaid, or having done so should discontinue to use and bear the same his estate whether an estate for life or an estate in tail should absolutely determine and the estates should immediately go to the person next entitled in remainder under the limitations of the will, in the same manner as if the person then entitled were dead. The testator bequeathed his residuary personal estate, including leaseholds, upon trust for conversion and investment and to hold the investments upon the like trusts as though the same were capital moneys arising from a sale under the Settled Land Acts, 1882 to 1890, and so that the trust fund should be impressed with a trust for investment thereof in the purchase of freehold land to be settled in like manner as the testator's freehold estates.

The testator died on December 31, 1899, and his will was duly proved by Wentworth Watson and A. R. Farrer on March 2, 1900.

The defendant Sir Michael Culme-Seymour was born on April 25, 1909. His father Admiral Culme-Seymour died on April 2, 1925; Wentworth Watson died without ever having had any issue on July 5, 1925.

By an appointment dated November 15, 1925, the defendant the Hon. Sir Hubert George Brand was appointed a trustee of the will in the place of Wentworth Watson deceased, and by another appointment dated November 15, 1925, the defendant Cecil Dunstan Webb was appointed a trustee thereof in the place of Arthur Richmond Farrer, then deceased. On the death of Wentworth Watson the plaintiff became tenant in tail male in possession of the Rockingham estates devised by the testator's will, subject to the effect (if any) of the proviso contained in clause 11, and having attained the age of twenty-one years on April 25, 1909, by a disentailing deed dated April 26, 1909, and made between the plaintiff of the one part and the defendant trustees of the other part, he disentailed those estates. The plaintiff being desirous of ascertaining whether he was bound to take and bear the name and arms of Watson this summons was issued to determine the question whether in the events which had happened he was indefeasibly entitled in equity to the Rockingham Castle estates and other freeholds settled by the testator's will and the investments representing capital moneys and the trust fund respectively settled by the will, free from the condition in clause 12 thereof requiring him to take and use the name and arms of Watson.

Upon the opening of the summons *J. Neville Gray* for the persons claiming to be entitled in remainder admitted that the only question he could argue was whether the plaintiff came within the proviso in clause 11 of the will, cutting down estates tail to estates for life.

Gover K.C. and *C. A. J. Bonner* for the plaintiffs. The expression " in due time " in this context generally refers

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to the period of gestation: see Jarman on Wills, vol. iii., p. 1675, note (*d*), and *In re Wass* (1), referred to in that note, cannot possibly apply to this case. The plaintiff not having been born until 1909 is not within the proviso cutting down his estate tail to an estate for life, and having disentailed the estates he is not bound by the condition requiring him to take and use the name and arms of Watson. The words cannot, we submit, refer to a period of twenty-one years after the death of the testator, for if they did the condition would be void as limiting the estates to an unborn child of an unborn person, thus infringing the rule against double possibilities: *Whitby* v. *Mitchell.* (2) In a corresponding form in Prideaux's Precedents, 22nd ed., vol. iii., p. 793, the words used are " born or *en ventre sa mère* in my lifetime."

F. E. Farrer for the trustees referred to *Villar* v. *Gilbey* (3) and *Marlborough* (*Duke*) v. *Godolphin* (*Earl*). (4) In *Villar* v. *Gilbey* Swinfen Eady J. used the expression " in due time " as referring to the period of gestation.

J. Neville Gray for the remaindermen. The expression " within due time " no doubt refers to the period of gestation when used with reference to a child of the testator himself, but it cannot mean that as to the child of another person.

[EVE J. Why cannot the testator have used these words to define a class of children?]

Here " within due time " means within twenty-one years or within such period as is necessary to make and keep it a lawful limitation. The testator was anxious to make this settlement last as long a time as possible. He therefore directed that the tenants in tail referred to should have their interests cut down to estates for life if they were born in his lifetime or at any time afterwards so long as it was within a time permitted by rules of law. I submit that the estate tail has been cut down to an estate for life and has therefore not been barred, and the plaintiff is bound by the condition.

Gover replied.

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(1) (1882) W. N. 158.

(2) (1890) 44 Ch. D. 85.

(3) [1905] 2 Ch. 301, 305; reversed [1906] 1 Ch. 583, restored [1907] A. C. 139.

(4) (1759) 1 Eden, 404.

EVE J. The question in this case is, What meaning is to be attached to the words "within due time" in clause 11 of the testator's will? The will settled the estate upon the usual limitations in tail, and provided by this clause "that if any son or sons of Wentworth Watson or Michael Culme-Seymour"—who in the events which had happened were successive tenants for life in remainder—"shall be hereafter born whether during my lifetime or within due time after my death the estate in tail male hereinbefore devised to each such son shall not take effect," and in lieu thereof he was to take as tenant for life.

The facts are these: The testator died in 1899 and Wentworth Watson entered into possession as tenant for life. The plaintiff, a son of Michael Culme-Seymour, was born in 1909; his father died in the lifetime of Wentworth Watson, and on the death of the latter without issue the plaintiff came into possession (as he claims) as tenant in tail. On attaining twenty-one in April, 1930, he executed a disentailing deed.

It is now argued that the disentailing deed is inoperative, because under clause 11 of the will the plaintiff's interest is cut down to a life tenancy. This argument would appear to impose on the words "within due time after my death" a construction which would involve a breach of what has been called the rule against double possibilities, otherwise the rule which prohibits the limitation of an estate to the unborn child of an unborn person. Unless therefore some other meaning can be attached to the words I have referred to, the limitations subsequent to Wentworth Watson's life estate would be void.

Mr. Gover has argued that the words refer to the period of gestation, and undoubtedly they are frequently so used. Indeed I think one might go so far as to say that this is their primary meaning. It is probable they have slipped into the testator's will through inadvertence—possibly copied from a precedent wherein the testator was cutting down the interest of his own children. They certainly are not appropriate to be used in relation to the children of other parents, but

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there they are, and having to choose between a construction which would not only avoid the limitations but would really give no clue to what the testator meant by "due time" and one which gives an intelligible if whimsical meaning to the words, I think I am justified in adopting Mr. Gover's argument and declaring that the proviso is limited to sons of Wentworth Watson and Michael Culme-Seymour born in the lifetime of the testator or within nine months of his death. The disentailing deed is therefore operative.

I answer all the questions asked by the summons in the affirmative.

Solicitors: *Kendall, Price & Francis; Farrer & Co.*

H. L. L.

In re CASTNER-KELLNER ALKALI COMPANY, LIMITED.

EVE J.
1930
July 22, 25.

Company—Scheme of Arrangement—Transfer of Shares to another Company—Approval by Majority of Shareholders—Dissenting Shareholders—Power to determine Terms of Purchase of Shares — Original Scheme superseded by later Amalgamation—Companies Act, 1929 (19 *&* 20 *Geo.* 5, c. 23), s. 155.

Upon a petition to sanction a scheme of arrangement and amalgamation under s. 155 of the Companies Act, 1929, the Court has power to determine the terms upon which the shares of shareholders who have dissented from the scheme approved by the majority shall be acquired, notwithstanding that since the original offer was made the scheme has been superseded by a later amalgamation which has absorbed the transferee company, and the fact that the petitioners cannot offer to the dissentients the original shares accepted by the majority makes no difference to the jurisdiction of the Court, which is only bound to decide whether the terms offered are adequate and reasonable, and if not, to substitute such other terms of purchase as, in its discretion, are fair and just.

PETITION.

The object of the petition was to enable the petitioners, Brunner, Mond, & Co., Ld. (the "transferee company"), to give notice under s. 155 of the Companies Act, 1929, to those shareholders of the Castner-Kellner Alkali Company, Ld. (the "transferor company"), who had dissented from a scheme involving the transfer of the shares of the transferor company to the transferee company, that it desired to acquire their shares upon certain terms.

The transferor company was incorporated under the Companies Act, 1862, in 1895 to carry on business as manufacturers of chemical products, which it had done since that date. The capital was 1,000,000*l.* divided into 1,000,000 shares of 1*l.* each fully paid. The transferee company was incorporated in 1881 to carry on the trade of chemical manufacturers and to acquire and hold shares in any other company, and its capital in January, 1920, when the scheme for acquisition of the shares of the transferor company was put forward was 15,000,000*l.*, divided into 15,000,000 shares of 1*l.* each, of which 150,000 preference shares carrying a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum, and 7,970,376 ordinary shares had been issued and were fully paid on January 17, 1920.

The transferee company being one of the largest customers of the transferor company and also the owner or holder of 252,000 shares of the transferor company, negotiations took place in 1919 for a complete fusion of interests between the two companies. The scheme was embodied in an offer made by the transferee company to all the outside shareholders in the transferor company by which the shares of members of the transferor company were to be transferred to the transferee company in exchange for the issue to them as fully paid up of two ordinary 1*l.* shares of the transferee company for every ordinary 1*l.* share of the transferor company, to rank for dividend as from September 30, 1919, and the offer was conditional on its being accepted by the holders of 75 per cent. of the 748,000 shares of the transferor company owned by persons other than the transferee company. The offer was accepted by upwards of 75 per cent. of the shareholders within a short period, and by September, 1922, the scheme had been approved and the offer accepted by the holders of more than nine-tenths of the shares affected. At the date of the petition the transferee company was the owner of all the shares of the transferor company except 703 shares held by twenty-two persons. On December 7, 1926, a further amalgamation took place, Imperial Chemical Industries, Ld., being formed to acquire all the shares in the transferee company and certain other companies. Its original capital of 65,000,000*l.* was increased from time to time and at the date of the petition was 95,000,000*l.* divided into preference and ordinary shares of 1*l.* each and deferred shares of 10*s.* each, the preference shares carrying a 7 per cent. cumulative dividend and the ordinary shares a 7 per cent. non-cumulative dividend. The terms of exchange of shares offered by the Imperial Company and accepted by substantially all the ordinary shareholders of the transferee company were three fully paid 1*l.* ordinary shares and two fully paid 10*s.* deferred shares of the Imperial Company for every two 1*l.* ordinary shares of the transferee company. The transferee company was now prepared to offer and to procure the allotment to the dissenting shareholders of the transferor company of fully paid shares in the Imperial Company at the rate aforesaid—namely, three 1*l.* ordinary shares and two 10*s.* deferred shares in respect of every 1*l.* share of the transferor company. This offer having been refused, the transferee company presented this petition under s. 155 of the Companies Act, 1929 (1), asking

(1) By the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 155, sub-s. 1: "Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as 'the transferee company'), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company:

"Provided that, where any such scheme or contract has been so approved at any time before the commencement of this Act, the court

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that it might be authorized to give notice to the dissenting shareholders of the transferor company that it desired to acquire their shares upon the above terms, or upon such other terms acceptable to and not involving the issue of further shares of the petitioners as the Court might see fit to direct.

Lionel Cohen K.C. and *Gordon Brown* for the petition.

Roger Turnbull for dissenting shareholders. The petitioning company, Brunner, Mond, & Co., Ld., having in its turn been absorbed by Imperial Chemical Industries, Ld., is unable to give effect to the terms of the original scheme. The section applies only where the company is able to give effect to the terms of the scheme. In the events which have happened, the company being now unable to exchange Castner-Kellner shares for Brunner Mond shares, cannot enforce the scheme on unwilling shareholders. But if the scheme is enforceable, the price now being offered by the petitioners is insufficient having regard to the real value of the shares in Castner-Kellner Alkali Company, Ld., and the reserve funds of that company.

Lionel Cohen K.C. replied.

Cur. adv. vult.

July 25. EVE J. This is a petition presented by Brunner, Mond, & Co. under the proviso contained in sub-s. 1 of s. 155 of the Companies Act, 1929, asking that they may be authorized to give notice to those members of the above named company who have dissented from or not yet assented to a scheme or contract involving the transfer of the shares of the above named company to the petitioners that the petitioners desire to acquire their shares on the terms that the petitioners

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may by order, on an application made to it by the transferee company within two months after the commencement of this Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the court may by the order direct instead of the terms provided by the scheme or contract."

procure the allotment and issue by the Imperial Chemical Industries to the dissentients of three fully paid 1*l*. ordinary and two fully paid 10*s*. deferred shares in the Imperial Company in respect of every 1*l*. share in the above named company.

At the hearing the proposal was varied by substituting for the three ordinary and two deferred shares in the Imperial Company a cash payment calculated on the market value of the Imperial Company's shares on the date of the order.

Objection is raised on behalf of the dissentient shareholders that the offer made by the petitioners is not the scheme or contract approved before the commencement of the Act of 1929 or in accordance with such scheme, but is in substance a new scheme superimposed on the approved scheme and one to which s. 155 has no application.

There is much to be said in support of that contention.

The original scheme put forward in January, 1920, was that stated in para. 15 of the petition—that is to say, an offer by the Mond company, conditional on its being accepted within six weeks by the holders of 75 per cent. of the 748,000 shares affected, to acquire the shares affected on the terms that two fully paid 1*l*. ordinary shares in the Mond company should be allotted in exchange for every 1*l*. share in the Castner-Kellner company transferred to the Mond company. The offer was accepted by 75 per cent. of the holders within the six weeks and by 90 per cent. and more before the end of 1922.

In December, 1926, the Imperial Chemical Industries, Ld., were incorporated with the object of acquiring (inter alia) all the shares in the Mond company, and shortly after its incorporation an offer on their part to give three of their fully paid 1*l*. ordinary shares and two of their fully paid 10*s*. deferred shares in exchange for every two ordinary shares in the Mond company was accepted by the great majority of the Mond shareholders.

The Mond company now seek as consideration for the acquisition of the shares of the dissentients to substitute for the allotment of two of their own shares an allotment of the five shares in Chemical Industries.

The dissentients point out that the market value of the five Chemical Industries shares is less than the value of the two Mond shares, that the Mond company are still in existence, that there is nothing to prevent the issue of their own shares, and that in the prayer of the petition they reject in anticipation any terms involving any further issue of their shares. In these circumstances they contend that no order ought to be made on this application, or alternatively that the Court, in the exercise of the wide discretion conferred upon it, ought not to compel them to accept the terms proposed by the petitioners.

I cannot accept the view that the application is not within the section by reason of the offer put forward by the petitioners. The function of the Court under the concluding words of sub-s. 1 of s. 155 is to determine on what terms the dissentients are to be dispossessed of their investment—there is nothing in the section to control the nature of the offer that the applicants may put forward ; it is for the Court to consider and decide whether it is an adequate and satisfactory one, and, if not, to substitute such other terms of purchase as in its discretion are fair and just. The would-be purchasers do not lose their statutory rights by making an inadequate or otherwise unacceptable offer. The fact, therefore, that in this case the petitioners are offering to the dissentients shares wholly different from those which were offered to the assenting majority does not disqualify them from availing themselves of the opportunity to purchase the dissentients' shares. The language of the section expressly contemplates a difference between the terms fixed by the Court for the dissentients and those provided by the scheme.

But in the exercise of my discretion I do not propose to adopt the offer made by the petitioners. I have no sufficient knowledge of the circumstances in which the exchange of the Mond shares for the Chemical shares was brought about or what it involved, or of the true relative values of the shares of those two companies, and I think the objection of the dissentients to accept shares of what I may perhaps call "the sub-purchasing company," or, what is the same thing,

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the present market value of these shares, in satisfaction for their holdings in the Castner-Kellner company is reasonable. Some other standard for fixing the pecuniary compensation payable must be resorted to.

I am not ungrateful for the industrious ingenuity expended by the petitioners in the compilation of various tabulated and other statements in support of their contention that the shares of the dissentients are not worth more than 3*l.* 17*s.* or 4*l.* each, but no one has been able to explain how some of these documents can be reconciled with the company's published reports and accounts. Each one of them involves points upon which further and fuller information is required for its proper understanding, and as appears from para. 7 of Mr. Coates's affidavit of May 26, they are based not upon what the company actually did with the profits, but what the deponent thinks they ought to have done. As I have no grounds for believing that the deponent is better qualified to conduct the company's business then were its directors, I am not prepared to substitute his speculative figures for those published by the company's responsible officers. Beyond saying that I can draw no useful conclusions from this hypothetical kind of evidence, I do not propose to criticize it further. Indeed, were I to do so it is quite possible that I should myself have reached the stage of "obsolescence" before I had finished.

I think, however, that there is one consideration which helps to fix the price to be paid by the petitioners. Under the original scheme two Mond shares were exchanged for one Castner share—in other words, the Castner share was treated as being worth double the Mond share—and it was on this basis that 90 per cent. of the affected shares were acquired by the Mond company before the end of 1922. It is impossible on the Castner company's published accounts and the dividends of recent years (that of last year with a capital bonus of 27 per cent. rising to over 66 per cent.) to believe that the Castner share is of less value to-day than it was in 1922. I am certainly not prepared to deal with the dissentients on less favourable terms than those given to the approving majority.

Last month Clauson J. in dealing with a petition similar to this one wherein Chemical Industries were seeking to acquire the shares of members of the Mond company who had dissented from the Chemical company's scheme for acquiring the Mond shares, fixed the value of the Mond share at 55*s.* 6*d.*, and in this case I propose to accept this valuation and fix the price to be paid for each share at 5*l.* 11*s.* (being the equivalent in value of two Mond shares) with interest thereon at 6 per cent. from December 31 last till payment. The petitioners must pay the costs.

Solicitors: *William Morris*; *Tucker & Co.*

H. L. L.

CLAUSON and LUXMOORE JJ.
1929
Nov. 20.

In re MOYNIHAN.

Ex parte TRUSTEE.

[13 of 1929.]

Bankruptcy—Procedure—Motion by Trustee in Bankruptcy in County Court——Decision of County Court Judge—Prima facie Case established—Adjournment of Motion by County Court Judge pending Appeal to Divisional Court.

M. having been adjudicated a bankrupt, the trustee in bankruptcy moved the county court for a declaration that certain documents executed by the bankrupt were fraudulent preferences.

The county court judge ruled on the evidence put forward by the applicant that a prima facie case had been established. Counsel for the respondent desiring to appeal and to bring rebutting evidence only in case the Divisional Court should affirm this ruling, the county court judge (counsel for the trustee not objecting) allowed the motion to stand over generally pending an appeal by the bankrupt to the High Court:—

Held, by the Divisional Court (Clauson and Luxmoore JJ.), that this procedure was irregular. The judge having ruled that there was a case for the respondent to answer should not have suspended proceedings in order to allow the respondent to appeal without having produced his evidence.

APPEAL by the debtor from a decision of the county court judge at Reading.

The debtor A. A. Moynihan was adjudicated a bankrupt on June 11, 1929. In October, 1929, a motion was made before the county court judge at Reading by the trustee in bankruptcy for a declaration (inter alia) that certain documents executed by the bankrupt were fraudulent preferences and void against the trustee in bankruptcy. At the hearing counsel for the respondent submitted that the evidence called by the trustee disclosed no prima facie case of fraudulent preference. The county court judge, following *In re Cohen* (1), held that the trustee had established a prima facie case of fraudulent preference and that the hearing of the motion would have to proceed, but in view of the fact that the counsel for the respondent wished to appeal against this decision, on his submission he adjourned the motion generally, to be restored to the list as soon as the appeal had been disposed of.

The respondent thereupon gave notice of appeal asking that the order of the county court judge might be discharged, varied or reversed, and that on the evidence adduced by the trustee there was no case. The grounds of appeal put forward were (inter alia): (1.) That the judge was wrong in law on the evidence adduced in holding that there was a prima facie case which called for an answer. (2.) That the judge was wrong in law in holding that on proof of insolvency and payment within the period specified by the Bankruptcy Act, 1914, s. 44, and without any further evidence, the trustee had discharged the necessary onus required to establish a prima facie case.

C. N. Tindale Davis for the appellant, respondent, to the original motion.

W. N. Stable for the trustee in bankruptcy, respondent to the appeal.

CLAUSON J. [in delivering the judgment of the Court, after briefly stating the facts, continued as follows :] At the hearing before the county court judge, counsel for the respondent submitted that the trustee had not presented before the court sufficient evidence to establish a prima facie case of fraudulent preference. The county court judge ruled against this submission. Counsel for the respondent was dissatisfied with this ruling and desired to appeal but he was not prepared to go on with the case on the footing that the evidence placed before the court by the trustee in bankruptcy was the only evidence, and he desired to reserve to himself the right, in case it should be ultimately held that the trustee's evidence was sufficient, to put forward evidence himself to support his case that it was not a matter of fraudulent preference. No objection to this seems to have been made by counsel for the trustee. The learned county court judge thereupon adjourned the motion generally, to enable the respondent to appeal.

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(1) [1924] 2 Ch. 515.

In my view this procedure is irregular. I should have thought that the sooner the facts were put before the court the better, and as a matter of principle one should not encourage any form of procedure that would enable a person to hold up possible information until he has made sure that he must disclose it. We have not been referred to any case in which a judge, having ruled that there is a case for the defendant to answer, has suspended proceedings in order to enable the defendant to bring an appeal against this ruling. In my opinion the right course is for the whole matter to be completed before the county court judge notwithstanding the desire of both counsel that the matter should be brought here prematurely.

The order of the county court must be discharged and the hearing of the motion must proceed before the county court judge who will on that hearing deal with the costs of this appeal.

LUXMOORE J. I agree.

Appeal dismissed.

Solicitors: *Williamson, Hill & Co., for Page, Gulliford & Gregory, Southampton; Edwin E. Clark & Son.*

A. R. T.

In re JOEL'S LEASE.

BERWICK *v.* BAIRD.

MAUGHAM J.
1930
May 22.

[1929. J. 2863.]

Landlord and Tenant—Lease of Stud Farm—Expiration of Lease—Refusal to give up Possession without One Year's Notice—" Agricultural holding " —Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *s.* 48—*Agricultural Holdings Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *ss.* 23, 33, 57.

A holding let for the breeding of pedigree horses is not necessarily an agricultural holding within the Agricultural Holdings Act, 1923.

A lessor sold to the plaintiff the freehold of certain property subject to a lease to the defendant. The lease described the property as the P. stud farm; it contained covenants to repair, varnish, and distemper paddock boxes, stables, and coach-house, to graze down turf by stocking and mowing, and not to use the premises otherwise than as a stud farm: and the schedule contained a description of the stud farm. The tenancy was due to expire by effluxion of time shortly after the sale to the plaintiff, but the defendant refused to give vacant possession, alleging that the lease created an " agricultural holding " within the Agricultural Holdings Act, 1923, and that the holding had not been terminated by twelve months' notice, as required by s. 23 of that Act. Upon a summons by the plaintiff for a declaration that the lease did not create a holding within the meaning of that Act, and that no notice was required for the termination of the defendant's tenancy:—

Held, that the main purpose of the letting was the breeding of racehorses, and that, although there were in most of the fields plots of grass or portions of pasture land, the holding was not " wholly pastoral," and that therefore s. 23 of the Agricultural Holdings Act, 1923, did not apply.

In re Lancaster and Macnamara [1918] 2 K. B. 472 referred to.

SUMMONS.

By a lease dated November 7, 1924, and made between Solomon Barnato Joel (hereinafter called " the lessor ") and John Calderwood Baird (hereinafter called " the defendant ") property described as a stud farm was let to the defendant. The lease was a lease of 102 acres, 3 roods and 3 perches of " land situate in the County of Sussex in the parishes of Jevington, Hailsham and Folkington, known as the Polegate Stud Farm as the same are particularised in the schedule and delineated on the plan, together with the stud groom's house and three cottages and the several paddock boxes loose and other boxes and other buildings thereon erected." The timber was reserved to the lessor. The term was for five years from September 29, 1924; the yearly rent was 350*l.*, which was shown by the evidence to be a very high rent for agricultural land. There were a number of covenants by the defendant. The first was to pay the rent, rates, taxes, charges and assessments and all other outgoings. The second was to "keep in as good a state of repair as the same are in on entry the said messuage cottages, paddock boxes and other boxes stables coach-houses and all and every other the buildings hereby demised." There followed covenants "to paint the inside of the premises, and twice during the term to black varnish lime white and distemper the horse boxes stables passages and other parts of the said premises now or usually varnished lime whitened or distempered," and covenants "to dress the woodwork of the paddock boxes with a suitable preservative, and to leave in as good a state of repair as on entry all roads paths and roadways and the gravelled yard at main boxes and all turf verges and the green lawn in stable yard neatly cut and tidy." Then there was a covenant "to preserve young trees and keep all iron fences and gates in repair suitable for a stud farm and keep all hedges and ditches in a tenantable condition." Covenant 7 (the only covenant in any way approaching a covenant in reference to cultivation) was in these terms: "And will use the grass lands in a reasonable manner and keep the turf well and evenly grazed down at least once a year by suitable mixed stocking and by mowing, and will keep the lands clean and free from rubbish." There followed a covenant to yield up, and in clause 9 there was a covenant by the defendant "not to build or suffer to be erected or built upon the premises any buildings other than those now erected thereon without the consent in writing of the lessor or his agent," and there was further a covenant that "the premises hereby demised shall not be used otherwise than as a stud farm." In the schedule to the lease was a description of what was called "the Stud Farm, Polegate," of a field described as a "Pasture field north of railway," and of other lands described in somewhat ambiguous terms, such as "Part eight, paddock and loose box," "Part nine, paddock and loose box and clump," "Part eleven, paddock and loose box," and "Parts sixteen, seventeen, and nineteen, paddock and loose box." Part six in the Jevington Parish was "Stallion boxes, stables, yards, sheds, pond, road and rough pasture." Part seven was "Paddock and loose box," and there was a reference to the stud groom's house and to other boxes and paddocks. The tenancy under the lease was for five years, and expired by effluxion of time on September 29, 1929. Shortly before that date the lessor put the freehold of the property up for sale subject to the lease. It was not, however, sold at the auction, but was subsequently bought by Frederick William Berwick (hereinafter called "the plaintiff"), who asked the defendant to give him vacant possession at the end of his lease. The defendant refused to do so on the ground that the lease created an "agricultural holding" within the Agricultural Holdings Act, 1923, and that the holding had not been terminated by twelve months' notice, as required under that Act. By this summons the plaintiff asked for a declaration that the lease did not create a holding within the meaning of that Act, that no notice was required to determine the defendant's tenancy, and that it terminated on September 29, 1929.

Sir Thomas Hughes K.C. and *Aubrey J. Spencer* for the plaintiff. There is an express covenant that the premises are not to be used otherwise than as a stud farm. User by the defendant contrary to the terms of the lease cannot be averred by him to show that this is an agricultural holding. The evidence shows that it is not a farm for agricultural purposes, and the buildings are adapted solely for horses, not for cattle. The owner of a stud farm is not a "farmer" in any sense of the word. This is a place for the purpose of breeding horses, and that is the only use to which it can be put. Regard must be had to the definition of a "holding" in the Agricultural Holdings Act, 1923, because s. 23 of that Act contains the expression "a tenancy of a holding." Sect. 57, sub-s. 1, states what a holding includes and what it does not include. (1) Here the land is not really cultivated, or in any sense "agricultural." It is used only for horses to graze on and to exercise on. Nor is it "pastoral," a word which means used for pasturing cattle or sheep. Under the Agricultural Holdings Act, 1908, it was held that land partly agricultural or pastoral and partly not did not come under that Act: *In re Lancaster and Macnamara.* (2) But that point was met by s. 33 of the Agricultural Holdings Act, 1923. (3) In Scotland there have been two recent cases, useful, although not in England, as throwing light on the matter. The first, *Inland Revenue* v. *Assessor for Ross and Cromarty and Snow Belt Farms, Ld.* (4), which arose under the Rating and Valuation Act, 1928, of Scotland, was a case of a silver fox farm for the breeding and rearing of silver foxes. The second case is *Inland Revenue* v. *Countess of Cromartie.* (5) In the present case, the use of the land is neither "agricultural" nor

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(1) Sect. 23, sub-s. 1: "In the case of a tenancy of a holding for a term of two years or upwards, the tenancy shall not terminate on the expiration of the term for which it was granted, unless not less than one year nor more than two years before the date fixed for the expiration of the term a written notice has been given by either party to the other of his intention to terminate the tenancy, and any notice so given shall be deemed to be a notice to quit for the purposes of this Act."

Sect. 57, sub-s. 1: "'Holding' does not include an allotment garden or include any land cultivated as a garden unless it is cultivated wholly or mainly for the purpose of the trade or business of market gardening, but, except as aforesaid, means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

(2) [1918] 2 K. B. 472.

(3) Sect. 33, sub-s. 1: "Where the land comprised in a contract of tenancy is not a holding within the meaning of this Act by reason only of the fact that the land so comprised includes land (hereinafter referred to as 'the non-statutory land') which, owing to the nature of the buildings thereon or to the use to which it is put, would not, if it had been separately let, be a holding within the meaning of this Act, the provisions of this Act relating to compensation for improvements and disturbance shall, unless otherwise agreed in writing, apply to the part of the land exclusive of the non-statutory land as if that part were a separate holding."

(4) 1930, Scots L. T. 214.

(5) 1930, Scots L. T. 244.

"pastoral" within the ordinary meaning of the English language.

F. K. Archer K.C. and *W. Hanbury Aggs* for the defendant.

In re Arbitration between Russell and Harding (1) was a case in which a farmhouse had been used for taking in paying guests, and it was sought to establish on the authority of the judgment of Scrutton L.J. in *In re Lancaster and Macnamara* (2) that it was a holding "Wholly devoted to agriculture and/or pasture." Scrutton L.J. had there said: "I imagine that in dealing with the question of fact as to whether a holding was wholly devoted to agriculture and/or pasture you would disregard infinitesimal things. The mere fact that a farmer sold tea to visitors, or that a farmer's wife had a small sweetstuff shop in one room of the farmhouse, would be disregarded. It would be a negligible matter which would not stop the land being wholly devoted to pasture." There is no definition, in the scientific sense. The important point is that the man concerned is getting his living out of the land. If what is being done really is turning the land to account, the letting is within the Act. If this was a chicken farm, it would have many of the qualities present in land used for the breeding of thoroughbred horses; but it would not be suggested that a chicken farm is not an agricultural holding. The fact that it is intended to breed horses some of which will have to be very carefully treated does not alter the nature of the pastoral use of the land. Pasturing cattle includes breeding cattle. In the case of *In re Lancaster and Macnamara* (3) Swinfen Eady M.R. says: "Can the holding be said in this case to be a parcel of land wholly pastoral? It is quite obvious that 'land' will include buildings upon it. That would come within the interpretation: naturally, for most, if not all, agricultural purposes there would be certain buildings on the land, and I treat the ordinary farmhouse or dwelling-house and cottages as part of the agricultural buildings." That would include all buildings which can be regarded as

(1) (1922) 128 L. T. 476.

(2) [1918] 2 K. B. 472, 483.

(3) [1918] 2 K. B. 472, 478.

of an agricultural nature. The whole of the holding in this case is of an agricultural nature.

Sir Thomas Hughes K.C. in reply. The lease is "for the purpose of a stud farm." That means a stud farm for breeding horses, and that is not an agricultural or a pastoral purpose.

MAUGHAM J. [having stated the facts :] There is evidence to the effect that prior to the granting of the lease Mr. Joel occupied the land himself and used the premises as a stud farm for the breeding of race-horses ; and there is further evidence with regard to the nature of the buildings on the stud farm in the Particulars and Conditions of Sale of the farm on July 22, 1929, being the sale of the freehold subject to the lease which was then thought to be coming to an end in the following September. I think that it is manifest from a consideration of those two facts that the premises were laid out and the buildings were erected for the purposes of a stud farm in the ordinary sense—namely, a stud farm for the breeding of horses and particularly of racehorses. I find in the Particulars of Sale a number of pictures or photographs which show just the view that a stud farm for the purpose of breeding race-horses presents. There is, for instance, the principal set of buildings occupying four sides of an enclosed yard which is entered through a pair of gates with brick pillars crowned by stone ball ornaments. There are in all twenty-one loose boxes of a somewhat elaborate character, as well as a number of other boxes, fodder room, stables, and so forth. In the centre of the enclosed yard there is an ornamental grass plot planted with horse-chestnut trees and a lime tree, and the buildings which completely surround it are buildings that would be found only on a stud farm of the character I have mentioned. There are also a number of other yearling boxes, which are obviously boxes for horses. There are a number of cottages, and there is an elaborate stud groom's house, which is obviously a house for a stud groom employed in connection with the breeding of horses. I think there is no question but that the premises were laid out for a stud farm in the sense in which I have used the phrase—namely, a stud farm for the breeding of either race-horses or pedigree horses of some kind, and that the lease itself shows that the phrase "stud farm" is being used in that sense. I will add, with reference to the proper meaning of the phrase "stud farm," that a reference to the celebrated Oxford Dictionary shows that the primary meaning of "stud" in connection with such a word as "Farm" is an establishment in which stallions and mares are kept for breeding, and also stallions and mares kept in such an establishment. It is interesting to note that the word "stud" is derived from an old middle-English or from a German word indicating "mare." I do not doubt for a moment that the word "stud," as the dictionary shows, has been in recent times sometimes used as meaning animals other than horses; but in the present case I come to the conclusion that this Polegate Stud Farm was designed and let as a farm for the purpose of breeding race-horses or other pedigree horses.

I think that that has a considerable bearing upon the matter, because, to my mind, it would be most unsafe to hold that every farm for the breeding of animals is in the same position, or that there may not be farms for the breeding of animals, for instance for the breeding of pedigree cattle, which may be agricultural holdings. In my view everything depends upon the precise nature of the evidence as to the holding itself. It is not suggested on the part of the defendant, and I think wisely not suggested, that the holding here is a holding of an agricultural character. What is suggested is that it is pastoral, and further that it is *wholly* pastoral (see s. 57, sub-s. 1, of the Act), and that is the point which I have to determine.

I think that it is reasonably clear that quite a fair proportion of the land comprised in the tenancy might properly be described as pastoral land. I do not rely merely upon the description in the schedule to the lease, but there it may be observed that the fields north of the railway are described as pasture land, and I do not see the smallest reason to doubt that there are other lands included with this stud farm which are also pasture land. That, however, in the view that I take of the Act will not absolve me from determining the question whether the holding is wholly pastoral land. It was settled under the old Act of 1908 by the decision of *In re Lancaster and Macnamara* (1) that "the subject of the letting is not a 'holding' within the meaning of s. 48 of the Agricultural Holdings Act, 1908," if in part of the tenancy there was included an inn. (2) That has been to some extent altered by s. 33 of the Agricultural Holdings Act, 1923, under which there is an important alteration, in that: [His Lordship read sub-s. 1 and continued:] In my view it is clear that the precise language of the section stating that the provisions of the Act in such a case relating to compensation for improvements and disturbance shall apply only to what is called the "part of the land exclusive of the non-statutory land," shows beyond reasonable doubt that the rest of the provisions of the Act do not apply; and accordingly I see no reason for supposing that s. 23 of the Act under which the tenant is entitled to not less than one year's written notice of the intention of the landlord to terminate the tenancy applies where part only of the holding is an agricultural holding.

Now is it true to come to the conclusion, which I think must be a conclusion of fact on the evidence that has been adduced in this case, that those parts of the premises which are not pasture land in the ordinary sense can fairly be described as a holding of a pastoral character so that the whole holding is an agricultural holding? I think, in considering that, I have got to bear in mind the purpose of the letting as evidenced by the circumstances in relation to the nature of the property and to the terms of the lease. I do not think that it is right to come to the conclusion that the holding as a whole was intended for a purely pastoral purpose. To my mind the main purpose of the letting of that part of the premises which is, strictly speaking, the stud farm, is the breeding of race-horses ; and the fact that there are in most, though not in all, of the fields in question certain plots of grass, or certain portions of pasture land, does not to my mind establish the proposition that the holding is wholly pastoral. I am a little impressed by the fact that there is not, strictly speaking, any covenant for cultivation in an ordinary sense. I do not think that condition 7, which I have read, shows anything more than a desire on the part of the landlord that the premises should be kept neat and tidy and that the grass should be preserved. It does not really mean that the premises should be kept in the same way as would be required if it was a purely pastoral tenancy. There is nothing about the production of hay on the farm, as such ; there is nothing in terms about not breaking up the land so far as it is permanent pasture ; there is no ordinary cultivation clause, and I doubt very much whether it is intended that the rules of good husbandry, as they are defined in s. 57 of the Act of 1923, were ever intended to apply to this holding.

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(1) [1918] 2 K. B. 472.

(2) Sect. 48, sub-s. 1: "'Holding' means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

The conclusion I therefore come to is that the real object and intention of the lease was not to lease a holding which was wholly pastoral, with the result that, in my opinion, s. 23 of the Act does not apply.

I have already expressed my opinion that some part of the tenancy is pastoral, and accordingly the defendant will have such benefit as he may be entitled to under s. 33.

Solicitors : *W. B. Wattson ; Ford, Lloyd, Bartlett & Michelmore, for Hillman, Burt & Warren, Eastbourne.*

K. R. A. H.

MAUGHAM J.

1930

May 30.

In re THE WILLIAM THOMAS SHIPPING COMPANY, LIMITED.

H. W. DILLON AND SONS, LIMITED *v.* THE COMPANY AND OTHERS.

In re SIR ROBERT THOMAS AND OTHERS.

[1930. W. 1160.]

Company—Debenture Holders' Action—Appointment of Receiver—Publication of Interview criticizing Application for his Appointment—Motion to Commit—Contempt of Court—Jurisdiction.

"Contempt of Court" may include conduct which, while it cannot directly influence a judge's mind, is calculated to affect the conduct of parties to proceedings, and the Court's jurisdiction to commit for contempt is not confined to cases in which its orders may directly be affected.

On the application of the plaintiffs in a debenture holders' action, a receiver of the shipping company was appointed on the ground of jeopardy. A director of a company which managed the shipping company's business, who was also a guarantor of debentures issued by the shipping company, authorized newspapers to publish interviews in which he adversely criticized the conduct of the plaintiffs in having obtained the appointment of a receiver, and he further stated that by so doing they had "smashed the goodwill and organization of the business in a day" and that "no one in shipping circles can understand this line of conduct." The interviews did not state that the appointment was on the ground of jeopardy or that, as was the fact, the company could not continue to carry on business unless money was immediately found. On a motion by the plaintiffs for an order to commit the director, and also the managing editor and the owners and publishers of the newspapers:—

Held, that the publication of injurious misrepresentations concerning parties to proceedings in relation to those proceedings may amount to contempt of Court, because it may cause those parties to discontinue or to compromise, and because it may deter persons with good causes of action from coming to the Court, and is thus likely to affect the course of justice.

Kitcat v. *Sharp* (1882) 31 W. R. 227; *Ilkley Local Board* v. *Oswald Lister* (1895) 11 Times L. R. 176; *The Queen* v. *Payne* [1896] 1 Q. B. 577; and *In re Clements* (1877) 46 L. J. (Ch.) 375 referred to.

Dictum of Lord Hardwicke in *Read and Huggonson's Case* (1742) 2 Atk. 469 followed.

MOTION.

The following statement of the facts is taken in substance from the judgment of Maugham J.:—

The William Thomas Shipping Company (hereinafter called "the company") had an issue of 200,000*l.* worth of debenture stock outstanding at the beginning of this year, and of that H. W. Dillon & Sons, Ld. (hereinafter called "the plaintiffs"), possessed a substantial holding. The writ in the plaintiffs' debenture holders' action was issued on March 26, 1930, and on March 29, 1930, Bennett J. appointed a Mr. Charles Dupre Ross receiver and manager on behalf of the holders of the first mortgage debenture stock in the company. In that action the company was present, and the trustees for the debenture holders, Richard Henry Dillon and Owen William Owen, were also represented. The evidence in support of that application showed beyond dispute that the company was completely unable to carry on its business, that unsecured creditors of the company could not be paid, that proceedings had been commenced in respect of debts due by the company, and that its ships in foreign ports were in danger of immediate arrest and, so far as they were not in foreign ports, were in danger of maritime perils, because there was no money available to pay the premiums for their insurance. As was admitted by counsel on behalf of the company, it was a case of extreme jeopardy, and the usual order was made.

Sir Robert Thomas was governing director of R. J. Thomas & Co., Ld., who had been managers of the steamships belonging to the company. He had a large number of shares in the company and had guaranteed the debentures, together with the interest, and as the result of the desperate position of the company it was inevitable that he, in the position in which he was, must go bankrupt. He determined to file his petition, and he was desirous, on or about May 15, 1930, of explaining his position to people at Liverpool and the district where he was extremely well known. In order to effect that he caused a reporter from the Liverpool Echo to come to see him at his house or office and gave a

MAUGHAM J.

1930

THE WILLIAM THOMAS SHIPPING Co., *In re.* H. W. DILLON & SONS, LD. *v.* THE COMPANY. SIR ROBERT THOMAS, *In re.*

written statement which he desired to be printed. It was printed in the Liverpool Echo, and another paper published only a shorter statement. In the Liverpool Echo the statement of Sir Robert Thomas was published on May 16, 1930, with a portrait of Sir Robert. The paper put the matter under the heading of "Big Shipping Sensation. Noted Baronet's Petition. Sir Robt. J. Thomas"; then came in inverted commas, "Organisation smashed in a day"; then, in still bigger letters, "Writ—and the Sequel." Sir Robert's statement was that he returned from the South of France after being seriously ill for some months. He stated that the company had for a number of years run the line of steamers to South American ports but, like all other shipping companies, it had suffered from severe depression in freights, particularly during recent months. Then he said that he held shares and had guaranteed them, and that he was satisfied that when the present depression had passed away the company would again make profits, as it had done in the previous years. Then he proceeded: "Unfortunately one of the debenture holders, Messrs. H. W. Dillon & Sons, London, a partner in which concern is also a trustee for the debenture holders"—that was not accurate, as the plaintiffs were H. W. Dillon & Sons, Ld., and the defendant Richard Edwin Dillon was not a director of the company—"and who are also the London agents of the William Thomas Company and have acted in this capacity for many years, issued a writ and made an application for the appointment of a receiver." There was nothing about the jeopardy, nothing about the desperate position of the company, nothing about the fact that it could not possibly go on unless the money was found immediately. Then the statement in special print added: "The judge granted the application, with the result that the goodwill of the business, and the immense organisation which had been built up on the continent, was smashed up in a day. No one in shipping circles can understand this line of conduct." Then he said that he had done something for the benefit of the Dillon brothers or one of them, and added something about the other trustees for the debenture holders which was not quite accurate, continuing: "As I am not in a position to meet the claims under the guarantees which I have given, and as I am not prepared to allow Messrs. Dillon to get a preferential position as creditors, I have decided to file my petition in bankruptcy, and this has been now done through my solicitor, Mr. T. R. Evans. This will allow of all the creditors being placed on the same footing. It may be said in fairness to all other creditors and those to whom I have given guarantees, that the only writ which has been issued is that by Messrs. Dillon." That, again, was not quite accurate.

That was published in the Liverpool Echo and was circulated throughout Liverpool and the neighbourhood; and a somewhat similar statement was made in the Liverpool Post and Mercury. Upon that the present motion was launched by the plaintiffs, for an order that Sir Robert Thomas and the managing editor and the owners and publishers of the Liverpool Echo and the Liverpool Daily Post and Mercury might be committed to prison, on the ground that the publication of the interviews constituted contempt of Court.

Gavin Simonds K.C. and *J. B. Lindon* for the plaintiffs as applicants. The plaintiffs hold 10,000*l.* of the company's issue of debenture stock, and in the order appointing the receiver and manager, power was given to borrow 8000*l.* immediately. The order was made on the ground of jeopardy, but there is nothing about that fact in the articles complained of.

H. O. Danckwerts for the respondent Sir Robert Thomas. The statement made by Sir Robert Thomas was intended for honest and fair criticism of the plaintiffs' action, which Sir Robert thought he was entitled to make. Contempt of Court was not intended, and if it has been committed Sir Robert desires to apologize for it.

Sir Thomas Hughes K.C. and *Richard O'Sullivan* for the other respondents. It is fantastic to suggest that there could in this case be interference with the course of justice. It is generally admitted that the earlier cases are disregarded in favour of *The Queen* v. *Payne.* (1)

[They referred also to *In re New Gold Coast Exploration Co.* (2) and *Ilkley Local Board* v. *Oswald Lister.* (3)]

Gavin Simonds K.C. in reply. Any step calculated to pervert the course of justice is a contempt, as, for example, one which will improperly influence the mind of a jury. But that is only one. [He referred to Oswald on Contempt, 3rd ed., p. 91.] The articles are a gross misrepresentation of what was before the Court and of the result of the Court's order. This is an example of contempt in which it cannot be said that the mind of the judge could be affected. It is a perversion of justice by an attack upon the plaintiffs.

MAUGHAM J. [having stated the facts:] The question arises whether the action of Sir Robert in giving that statement, and of the editor in printing and publishing it, amounts to a contempt of Court—a matter upon which I have heard a certain amount of argument and should be willing to hear more, because I think it is of great importance that people should know how far they may go in comment in relation to pending proceedings. For my part, I am not in the least desirous of extending the law with regard to contempt of Court beyond that point at which it at present stands. I would add that all the defendants have, through their counsel, taken up a discreet and proper attitude. On behalf of Sir Robert Thomas I received by his affidavit and by his counsel a complete apology, and Sir Thomas Hughes for the other parties has also taken up the attitude that if, in the view of the Court, anything in the statements published in the newspapers is in the nature of a contempt, for that the newspapers desire to give an ample apology.

It seems to me that I have to consider whether the statement which I have read at some length is a statement which will in any sense tend to interfere with the course of justice. In *Read and Huggonson's Case* (4), decided as long ago as the

(1) [1896] 1 Q. B. 577.

(2) [1901] 1 Ch. 860.

(3) (1895) 11 Times L. R. 176.

(4) (1742) 2 Atk. 469.

year 1742, Lord Hardwicke said: "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard." In defining a little later three kinds of contempt he says, "there may be . . . . a contempt of this Court in abusing parties who are concerned in causes here," and adds, "there cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

There is an atmosphere in which a common law judge approaches the question of contempt somewhat different from that in which a judge who sits in this Division has to approach it. The common law judge is mainly thinking of the effect of the alleged contempt on the mind of the jury and also, I think, he has to consider the effect or the possible effect of the alleged contempt in preventing witnesses from coming forward to give evidence. In these days, at any rate, a judge who sits in this Division is not in the least likely to be prejudiced by statements published in the press as to the result of cases which are coming before hin. He has to determine the case on the evidence, of course, and with regard to principles of law as he understands them; and the view of a newspaper, however intelligently conducted it may be, cannot possibly affect his mind. Accordingly, a judge in the Chancery Division starts on the footing that only in the rarest possible case is it likely that the publication by a newspaper of such a statement as I have here to consider will affect the course of justice in the sense of influencing, altering or modifying the judgment or judgments which the Court will ultimately have to deliver; and if that were the only sort of contempt with which the Court is concerned, I think that I should have to dismiss this motion. But is it the only kind of contempt? Is it true to say that the second of the contempts enumerated by Lord Hardwicke, as above cited, is one on which reliance can no longer be placed by an applicant for such an order as is being asked for here? In other words, is it a contempt of Court, notwithstanding the recent decisions to which I am going to refer, to abuse the parties concerned in a pending cause or matter by injurious misrepresentations which may tend to influence the conduct of the party aggrieved in the proceedings or which may tend to cause other parties who have a proper cause of action not to approach the Court? There are a large number of cases where conduct of that sort has been treated as a contempt of Court. I think that undoubtedly *Kitcat* v. *Sharp* (1), a decision of Fry J., is one such case, and that the decision of Chitty J. in *Ilkley Local Board* v. *Oswald Lister* (2) is another. In the latter case the defendant published a number of copies of a circular which referred to the spiteful proceedings instituted against him by the plaintiffs, the Ilkley Local Board, and also misrepresented a statement which he alleged the Court had made in proceedings in which that local board were before it. Chitty J. said that the circular was plainly a gross contempt, and was so on several grounds. Apart, I think, from the misrepresentation of what took place in Court he said that there was no foundation for some of the statements made by the defendants, and that they reflected most seriously on the plaintiffs and were untrue; and he came to the conclusion that the defendant had committed a contempt which the Court, in the interest of suitors generally, could not overlook. He said that it was a gross and deliberate contempt.

It is quite clear that Chitty J, did not think that the circulars published by the defendant on the occasion of an election for the Ilkley Local Board were likely to prejudice them at the trial of the action in the Chancery Division. That could not be the ground on which he interfered. In the only book which I think has been published on contempt for a number of years, Oswald on Contempt—and I am citing from the third edition—there are two passages which take the view that contempt is not confined to an interference with, or possible interference with, the decision of the Court.

(1) 31 W. R. 227. (2) 11 Times L. R. 176.

On p. 87 the author says: "Any conduct by which the course of justice is perverted, either by a party or a stranger, is a contempt; thus the use of threats, by letter or otherwise, to a party while his suit is pending, even if the threatening letter is marked 'Private'; or abusing a party in letters to persons likely to be witnesses in the cause, have been held to be contempts." Then on p. 91 he says: "All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds—namely, those which (1.) scandalise the Court; or (2.) abuse the parties concerned in causes there; or (3.) prejudice mankind against persons before the cause is heard"; and under the second heading he says that "anything which tends to excite prejudice against the parties in the litigation while it is pending" is contempt; and a very large number of cases are cited—I agree most of them old ones—in support of that proposition.

It seems that application for attachment against newspapers based on the ground that their publications were tending to prejudice the fair trial of charges against an accused became rather common at one time in the Queen's Bench Division, and in the case of *The Queen* v. *Payne* (1) the Court, which consisted of two such eminent judges as Lord Russell of Killowen C.J. and Wright J., made a stand against such applications. I will not go through the facts of that case, because it would take up too much time; the Lord Chief Justice pointed out that the power which the Court possessed in such a case was not to be exercised except in cases where there was real contempt, where there were serious grounds for its exercise. He was dealing with a case where it was alleged that the articles tended to prejudice the applicant in the eyes of the jury who were to try him, and I think that I am right in saying that his observations were mainly directed to cases of that kind. Finally he adopted a judgment of Cotton L.J. in the case of *Hunt* v. *Clarke* (2), where the Lord Justice said: "There should be no such application made unless the

(1) [1896] 1 Q. B. 577. (2) (1889) 58 L. J. (Q. B.) 490, 493.

MAUGHAM J.

1930

THE WILLIAM THOMAS SHIPPING CO., *In re.* H. W. DILLON & SONS, LD. *v.* THE COMPANY. SIR ROBERT THOMAS, *In re.*

thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interruption or interference."

Dealing, as I am here, with a case very different from that which came before the Court in *The Queen* v. *Payne* (1) I must express my opinion that the jurisdiction of the Court is not confined to cases where the order of the Court or the future orders of the Court are likely to be directly affected in some way. If it were so confined, I doubt whether there would be any limit to what a litigant, or some other person, might say pending the hearing of an action in the Chancery Division, unless, indeed, it could be shown that possible witnesses in the case were being interfered with. I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason. I think that that consideration has peculiar weight in the case of a representative action such as this, being an action of a kind which is generally brought in the Chancery Division. A plaintiff with perhaps quite a small stake in a series of debentures issued by a company commences an action asking for the ordinary relief in a debenture holders' action and obtains the appointment of an officer of the Court. If he can be attacked pending the hearing of the action, after the appointment of the receiver, by statements which are misleading and untrue, and which thereby suggest to the public that his action is grossly oppressive, improper and spiteful, I think that his conduct in such an action is very likely to be affected, and he may, for all I know, in such a case be tempted, being dominus litis, to take a course which is not in the interests of the other debenture holders whom he is there to represent. My opinion is that such an attack may interfere with the course of justice and ought not to be allowed. I am not saying that if Sir Robert Thomas had fairly stated the result of the evidence on which the Court made the order for the appointment of a receiver and manager, and had in a temperate manner expressed his opinion that another course ought to have been taken by the plaintiff, the Court would have thought fit to interfere or could properly have interfered. What I think is so regrettable here is that, without in the very least intimating the grounds upon which the application for the receiver was made, and, in fact, suggesting that there were no grounds worthy of consideration, he then proceeds to say that the Court granted the application, with the result that the goodwill of the business and the immense organization which had been built up on the continent was smashed up in a day. I think that that is a wholly incorrect statement of what took place before this Court, and when he adds the comment upon that "No one in shipping circles can understand this line of conduct," I think that he is suggesting that the plaintiffs have acted with gross impropriety; and that suggestion would, or might, tend to dissuade them from continuing in the action properly to represent the rest of the debenture holders.

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(1) [1896] 1 Q. B. 577.

In dealing with the present application I have taken into consideration the fact that Sir Robert was in a very awkward position. He had suffered from misfortunes in connection with this shipping company—misfortunes in regard to which he is not alone—and, accordingly, I think that in his case, and having regard to the apology which he has given at this trial, I shall be justified in ordering him merely to pay the costs.

With regard to the other respondents to the motion, I have somewhat more doubt as to their position, but I do not think they were justified in printing this statement, regard being had to the fact that it is wholly misleading. It is to be said in their defence that they did try to get some information from the other side before publishing what was on the face of it an ex parte statement; but they were in too much of a hurry to get the shipping sensation into their papers; they could

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1930
The William Thomas Shipping Co., *In re.*
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not wait a day for the purpose of verifying the facts. Accordingly, they have published an ex parte statement which, as I have already said, I regard as being of a most misleading character, and one which, as I have found, is calculated to interfere, in the circumstances which I have explained, with the course of justice. Accordingly, they also must be responsible for paying the costs of the motion. Subject to that, I do not think fit, in the circumstances, to make any order.

Solicitors: *W. Gordon Hill; Charles Lightbound & Co., for T. R. Evans, Holyhead; Field, Roscoe & Co., for Oliver Jones, Billson & Co., Liverpool.*

K. R. A. H.

FARWELL J.
1930
June 19.

In re WILLIAMS.

RICHARDS *v.* WILLIAMS.

[1927. W. 3921.]

Administration—Administrator—Right to prefer Creditors—Exercise of Right—Equitable Assignment of future Assets—Estate ultimately insolvent—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 2.

A personal representative's right to prefer creditors, a right preserved by s. 34, sub-s. 2, of the Administration of Estates Act, 1925, can be exercised not only by payment in cash, or by a legal charge equivalent thereto, but also by an equitable assignment of future assets that materialize before an administration decree.

Adjourned Summonses.

On December 25, 1926, the above named Williams, a farmer, died intestate, and on April 5, 1927, his widow the defendant took out administration to his estate, sworn at 1522*l.*, and believed to be solvent. There was no real estate, the property consisting mainly of farming stock and implements which were put in the hands of auctioneers to be sold in September, 1927, when it was thought that better prices could be obtained.

On May 19, 1927, a creditor John Griffith issued a writ for a debt of 300*l.* admittedly due from the intestate, and interest.

On June 3, 1927, by arrangement with John Griffith and in order to avoid litigation the administratrix addressed the following document to the auctioneers:—"I hereby authorize and request you to pay to Mr. John Griffith . . . . the sum of 300*l.* and interest out of the proceeds of the auction sale of my farming stock at . . . . this sum to be a first charge on the nett amount due to me." This was signed over a sixpenny stamp and witnessed, and a copy was given to Griffith by the auctioneers.

On September 10, 1927, another creditor David Pugh issued a writ for a debt of 829*l.* admittedly due.

On September 21 the administratrix handed Pugh's solicitor the following document headed *Pugh* v. *Williams*: "I hereby authorize and request you to pay [Pugh's solicitor] the sum of 829*l.* and costs of writ herein out of the proceeds of sale of the farming stock and effects at . . . . being the amount due to Mr. David Pugh . . . . and his receipt shall be a sufficient discharge to you for the same." This document was signed over a sixpenny stamp, but, though obviously intended to be addressed to the auctioneers, it was not in fact addressed to anybody.

On September 23 Pugh signed judgment against the administratrix for his debt and costs, but in consideration of her procuring the following undertaking from the auctioneers he did not proceed to execution.

On the same day at the request of the administratrix the auctioneers signed the following undertaking over a sixpenny stamp, with the same heading: "We the undersigned hereby agree to pay the sum of 829*l.* amount due herein together with ten guineas the costs herein as requested by [the administratrix] on April 29, 1928, out of the proceeds of sale of farming stock and affects at. . . . ." This was handed to Pugh's solicitor.

Up to this time the administratrix had no suspicion that the estate would prove insolvent.

On September 26 the auction took place and realized 942*l.* net.

On December 21 the plaintiff commenced the present creditors' administration action, and on January 20, 1928, a receiver was appointed. On August 7 the auctioneers paid him the 942*l.* net proceeds of sale. He was subsequently discharged, and all moneys were paid into Court on March 12, 1929.

The estate having proved insolvent, the question arose whether Griffith and, subject to his claim, Pugh were entitled to be paid their 300*l.* and 829*l.* in preference to the general creditors.

On December 9, 1929, and January 13, 1930, these summonses were issued to determine the point, Pugh's summons being first in order of date.

J. Leonard Stone for Griffith. Griffith had a valid equitable charge which attached the moment the auctioneers received the money : *Vane* (*Earl*) v. *Rigden* (1) ; *Hepworth* v. *Heslop* (2) ; *In re Jones.* (3)

Andrew Clark for Pugh. Griffith, who is in front of Pugh, has a good equitable assignment for his 300*l.* debt, but not for the interest, which is not admitted. Pugh has a good assignment for 829*l.* and costs : *Tailby* v. *Official Receiver.* (4) As to the forms of equitable assignment see *Lett* v. *Morris* (5) ; *Brice* v. *Bannister* (6) ; *Cotton* v. *Heyl.* (7)

Walter Hart for the plaintiff, representing the general body of creditors. The estate being insolvent must be administered under s. 34, sub-s. 1, and Schedule I., Part I., of the Administration of Estates Act, 1925. The whole money is in Court.

Schedule I., Part I., para. 2, provides that the same rules shall prevail "as to the priority of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

The Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 33, as to priority of debts provides as follows :—

Sub-ss. 1, 2, 3, 4 give certain priorities to rates, wages, distress for rent, etc.

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(1) (1870) L. R. 5 Ch. 663.

(2) (1849) 6 Ha. 561, 567.

(3) [1914] 1 Ch. 742, 746, 747.

(4) (1888) 13 App. Cas. 523, 533, 543, 546.

(5) (1831) 4 Sim. 607.

(6) (1878) 3 Q. B. D. 569.

(7) [1930] 1 Ch. 510, 520.

By sub-s. 5: "This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order."

By sub-s. 7: "Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu."

The applicants' only chance of success therefore is to show that the administratrix has exercised her right to prefer them under s. 34, sub-s. 2, of the Administration of Estates Act, 1925, which provides that the personal representative's right to prefer creditors may be exercised in respect of all the deceased's assets and nothing in this Act affects his right to prefer creditors. Now a right to prefer may be exercised by actual payment in cash or by a legal charge equivalent thereto: Robbins and Maw on Administration of Assets, 4th ed., p. 204. But there is no authority that it can be exercised by a mere agreement to prefer.

Now these equitable assignments of future money are mere agreements. Being for value the assignees could no doubt ask for specific performance. But they would at once be met by the countervailing equity of the general body of creditors, and specific performance would be refused.

In *Vane (Earl)* v. *Rigden* (1) actual debts were assigned, and in *Tailby* v. *Official Receiver* (2) and *Brice* v. *Bannister* (3) there were no countervailing equities. Here they are very strong. Griffith's claim to preference must in any case be limited to his 300*l.* debt.

J. Leonard Stone in reply. Specific performance considerations must not be imported into questions of equitable assignment: *Tailby* v. *Official Receiver.* (4) In any case Griffith and Pugh showed far greater diligence than the general body of creditors.

Andrew Clark in reply. If the plaintiff is right, an equitable assignment would always be void against a bankrupt.

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(1) (1870) L. R. 5 Ch. 663.

(2) (1888) 13 App. Cas. 523, 533, 543, 546.

(3) (1878) 3 Q. B. D. 569.

(4) 13 App. Cas. 523, 547.

FARWELL J. [after stating the facts:] It is not disputed that the administratrix could prefer one creditor to another, and it is plain that this right is preserved by s. 34, sub-s. 2, of the Administration of Estates Act, 1925.

Now here the administratrix did not exercise her right to prefer by actual payment. Nor did she give a legal charge on money actually in anybody's hands. She merely created equitable assignments of so much of the future proceeds of sale of the farming stock and implements as would be necessary to give Griffith 300*l.* and interest and Pugh 829*l.*

The plaintiff for the general body of creditors contends that an equitable assignment of moneys not yet in existence is nothing more than an agreement to assign, and a mere agreement to assign is not a good exercise of a right to prefer. He contends that the right to prefer can be exercised by actual payment in cash, or by giving a legal charge equivalent thereto, but not by a mere agreement. He admits that these two creditors could ask for specific performance, but contends that the moment they did so the Court would have to consider the countervailing equity of the general body of creditors and refuse that remedy.

It is not however necessary to determine what would have happened if there had been nothing more than an agreement, because, in my judgment, an administratrix who gives a creditor an equitable assignment of future moneys to come into the hands of herself or her agents effectually exercises her right to prefer under s. 34, sub-s. 2.

The plaintiff distinguishes *Vane (Earl)* v. *Rigden* (1), because in that case the assignment was of book debts then owing and therefore assignable, whereas in the present case there were no moneys until the farming stock was sold. But in my judgment, having regard to *Tailby* v. *Official Receiver* (2), the equitable assignment for value of moneys not then in existence so far as the parties are concerned, but to come into the hands of the auctioneers on the sale, operated as an effective assignment of those moneys directly they came into the auctioneers' hands, and the creditors could have recovered them without an action for specific performance.

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(1) L. R. 5 Ch. 663.

(2) 13 App. Cas. 523, 533, 543, 546, 547. [See also *In re Lind* [1915] 2 Ch. 345.]

The administratrix has therefore validly preferred these two creditors, but Griffith's preferential claim must be limited to his 300*l.* debt, and he must prove for his interest.

There will be a declaration that Griffith is entitled to be paid 300*l.* in preference to all other creditors, and subject to Griffith's claim Pugh is entitled to be paid 829*l.* in preference to all other creditors.

Solicitors: *G. F. Hudson, Matthews & Co.; Gregory, Rowcliffe & Co., for W. Morris Jones, Portmadoc; Harvey Clifton, for Robert Griffith, Blaenau-Festiniog.*

G. R. A.

In re PREVOST.

LLOYDS BANK, LIMITED *v.* BARCLAYS BANK, LIMITED.

EVE J.
1930
June 25; *July* 1.

[1929. P. 2502.]

Will—Voluntary Society—Gift of Real and Personal Estate to the London Library—Not Charitable—No Perpetuity—Gift Valid.

A gift of real and personal estate to the trustees of an unincorporated voluntary association, not being a charity, for the general purposes of the association *held* valid and not open to objection on the ground of remoteness.

ADJOURNED SUMMONS.

By his will dated August 11, 1926, the testator appointed the plaintiffs to be the executors and trustees of his will, and he devised and bequeathed the whole of his residuary estate to the trustees of the London Library, to be held by them upon trust for the general purposes of that institution, including the benefit of the staff. Then followed certain suggestions, which the testator declared should in nowise be deemed to create any trusts, as to the manner in which his real estate and certain items of his personal estate should be dealt with. He desired that, if possible, his property known as "Elfords" should not be sold, but should be used by the staff of the London Library or dismantled and left in charge of a caretaker, and that if it were sold the proceeds were to be used not for the general purposes of the library but for such benevolent or charitable purposes for the benefit of the staff of the library as the trustees should from time to time determine. By a codicil dated December 28, 1928, the testator revoked a gift over to a charity contained in his will, and gave all his estate which he might not have otherwise effectually disposed of to the defendant, Baron Frederick Grand d'Hauteville. The testator died on June 11, 1929.

The object of the London Library was to maintain a large and carefully selected collection of books, extending to all branches of literature, for circulation among its members, and reading rooms for their use. Rule 12 of its laws provided that its entire funds and property should be vested in trustees, in whose names investments should be made, and money by way of loan or otherwise should be raised and paid off. All acts of the trustees should nevertheless be subject to the control of the committee, and every resolution in writing of the committee should, when signed by the chairman, be obligatory upon, and a justification of the consequent acts of, and a discharge to, the trustees. Rule 13 provided that the committee should have the entire administration of the affairs of the Society, subject to the rules. Rule 28 provided that it should be lawful for the committee to apply any moneys in their hands, or under their control, in purchasing, taking on lease, or otherwise acquiring in the names of the trustees any lands or buildings suitable to the objects of the Library, or in erecting, enlarging, or otherwise adapting any suitable buildings on any land that might be acquired by them, to let, lease, or mortgage any such lands or buildings as security for any moneys borrowed; to sell or exchange any portion of the movable property and to apply the moneys produced by such sale to the general purposes of the Society; to hire any premises for the temporary occupation of the library, if excluded by any temporary cause from its own premises; and to apply the income of the Society in such a manner as they might think most conducive to its objects. Rule 29 provided that no dividend, gift, division, or bonus in moneys, should be made unto or between any of its members. Rule 37 provided that the rules might be altered by a resolution passed at an extraordinary general meeting by not less than two-thirds of those present and voting at the meeting.

The question raised by the summons was whether the gift to the London Library was valid, or invalid to any and what extent. The defendants, Barclays Bank, Ld., were the trustees of the Library.

C. R. R. Romer for the plaintiffs.

Gover K.C. and *A. Guest Mathews* for Barclays Bank, Ld. The Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), does not apply to an institute like the London Library. Sect. 11 gives power to an institute of this nature to hold land through trustees. The position of an unincorporated society is exactly the same as that of an individual, and a gift of land to it, not being for an unlawful purpose or creating a perpetuity, is valid. The only possible argument against the validity of this gift is that it would create a perpetuity, but there can be no real question of that. The library, through its trustees, is free to sell any part of its property when it wishes: see judgments of Joyce J. and Lord Cozens-Hardy M.R. in *In re Bowman* (1), and also the judgments in the House of Lords. (2) This case comes directly within *Cocks* v. *Manners.* (3) In *Carne* v. *Long* (4) the devise tended to create a perpetuity, and that case is not in point here. In *In re Clarke* (5), where the gift was held to be valid, Byrne J. reviewed all the earlier cases. Here there is a simple gift for the general purposes of the

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(1) [1915] 2 Ch. 447, 450, 461.
(2) [1917] A. C. 406.
(3) (1871) L. R. 12 Eq. 574.
(4) (1860) 2 D. F. & J. 75.
(5) [1901] 2 Ch. 110.

EVE J.
1930
PREVOST, *In re.*
LLOYDS BANK *v.* BARCLAYS BANK.

Library; there is no indication of an endowment, and there is no question of inalienability.

[They also cited *In re Clark's Trust* (1) and *In re Badger.* (2)]

Swords K.C. and *G. D. Johnston* for Baron d'Hauteville. There is no doubt that the bequest of personalty to the London Library is good. The doubt arises on the devise of land as tending to a perpetuity. In the first place the Court cannot ignore the intention of the testator as expressed by the will: *In re Dutton.* (3) Here the testator has clearly expressed his desire that "Elfords" should be held in perpetuity, and it must be taken that he knew the rules of the Library. Under those rules the trustees have no power to acquire or sell land: see particularly r. 28. But if they acquire it they must retain it in perpetuity. That differentiates the present case from *In re Clarke* (4), where there was no clog on the committee with regard to the buying and selling of land. *Carne* v. *Long* (5) and *In re Amos* (6) are both in point.

Gover K.C. in reply said that the argument that because the trustees have no express power to sell land there is a perpetuity is fallacious.

Cur. adv. vult.

July 1. EVE J. It is conceded that the testator's suggestions are of a precatory nature and create no trust, and the validity of the bequest of the personal estate is not seriously impeached, but as regards the realty two objections are put forward, the one that the devisees cannot accept it and have no power to dispose of it, and the other that it creates or tends to a perpetuity. In my opinion neither of these objections can be maintained. The gift is not a charitable gift in that the Library is not a charity but an institution for mutual benefit (*In re Clark's Trust* (1) and *In re Dutton* (3)), and if the gift is not void as tending to a

(1) (1875) 1 Ch. D. 497.
(2) [1905] 1 Ch. 568.
(3) (1878) 4 Ex. D. 54, 57.
(4) [1901] 2 Ch. 110.
(5) (1860) 2 D. F. & J. 75.
(6) [1891] 3 Ch. 159.

perpetuity there is no authority to support the argument that the devisees cannot accept it. Certainly *In re Badger* (1), cited in support of the argument, did not decide anything of the kind. All that case decided was that the trustees of the Stourbridge Institute had no power under the Library and Scientific Institutions Act, 1854, or otherwise, to mortgage the site of the institute for purposes other than the literary, scientific or other instructional purposes specified in s. 33 of the Act.

In the two cases I have already cited, as also in *Carne* v. *Long* (2); *Cocks* v. *Manners* (3); and *In re Clarke* (4) it will be found that the validity of the gifts was impeached on the two grounds of their being charitable or in perpetuity; there is no suggestion in any one of them that the gifts would not be effective as gifts to the institution in aid of its funds if they were found to be neither charitable nor in perpetuity, and I am unable to appreciate why in such circumstances they should not be.

In *Carne* v. *Long* Lord Campbell L.C. says (5): "If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity," and to a similar effect is a passage in the judgment of Byrne J. in *In re Clarke.* (6)

In my opinion no case has been established of the incapacity of the devisees to acquire realty by gift, and this of necessity involves the power to dispose of it. The gift is to the trustees of the Library upon trust to be expended in carrying out the objects of the Society according to its rules, and is a good and valid gift unless it infringes the rule against perpetuities.

To hold that it does infringe the rule one must arrive at the conclusion that when the subject-matter of the devise is vested in the trustees it will be held by them subject to a trust which will prevent the committee from realizing it and spending the proceeds; in other words, that the gift is one to which the trustees can only give effect by holding the property and applying the income according to the rules.

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(1) [1905] 1 Ch. 568.

(2) (1860) 2 D. F. & J. 75.

(3) (1871) L. R. 12 Eq. 574.

(4) [1901] 2 Ch. 110.

(5) 2 D. F. & J. 75, 79.

(6) [1901] 2 Ch. 110, 114.

I cannot see anything in the terms of the testator's residuary gift or in the rules of the Library to prevent the expenditure of the corpus of the property, and in my opinion the case falls within the class of case of which *Cocks* v. *Manners* (1) is the leading authority, and *In re Clarke* (2) and *In re Bowman* (3) are more recent illustrations.

Accordingly I hold that the gift of the testator's residuary real and personal estate to the trustees of the Library is valid, and ought to be carried into effect. The costs of all parties will be taxed as between solicitor and client and paid out of the residue.

Solicitors: *Fladgate & Co.; Gedge, Fiske & Co.*

(1) L. R. 12 Eq. 574.

(2) [1901] 2 Ch. 110.

(3) [1915] 2 Ch. 447; affirmed nom. *Bowman* v. *Secular Society* [1917] A. C. 406.

P. J. B.

In re JACKSON.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* ARCHBISHOP OF WALES.

EVE J.

1930
July 3.

[1929. J. 3036.]

Will—Construction—Charitable Bequest—Bequest to Archbishop of Wales for a charitable purpose "or" to be applied by him "in any manner which he may think best for helping to carry on the work of the Church in Wales"—Bequest void.

A testatrix made a bequest of half her residuary estate to the Archbishop of Wales for the time being to be paid and applied by him in or towards the General Fund belonging to the Church in Wales, or in his discretion in any manner as he might think best for helping to carry on the work of the Church in Wales:—

Held, that the alternative gift was too indefinite in that it could not be said that the application of it by the Archbishop must be for a charitable purpose, and that the whole gift was therefore void.

Dunne v. *Byrne* [1912] A. C. 407 followed.

ADJOURNED SUMMONS.

By her will dated May 24, 1928, the testatrix appointed the plaintiff company her executor and trustee, and, having bequeathed certain specific and pecuniary legacies, she devised and bequeathed all the residue of her real and personal estate to the plaintiff company upon trust for sale and conversion, and out of the proceeds of such sale to hand one moiety thereof to the Archbishop for the time being of Wales, to be paid and applied by him in or towards the General Fund belonging to that Church, or in his discretion in any manner which he might think best for helping to carry on the work of the Church in Wales, and as to the remaining moiety of the residuary estate she directed the plaintiff company to hand the same to the treasurer of the Universities' Mission to Central Africa. The testatrix died on May 22, 1929.

A question having arisen as to the validity of the bequest to the Archbishop of Wales, the plaintiff company took out this summons asking whether it was a good charitable bequest.

G. E. Tyrrell for the plaintiff company.

Vaisey K.C. and *J. B. Lindon* for the Archbishop of Wales. The work of the Church in Wales is a charitable work, and the gift here is to help it to carry on that work: see the judgment of Bennett J. in *In re Schoales* (1), where he cites the judgment of Romer J. in *In re Barnes.* (2) In *In re Bain* (3), where the bequest was held to be valid, the words of the will were not so strongly in favour of a charity as in the present case. In *Dunne* v. *Byrne* (4) the gift might have been used for a purpose that was neither charitable nor in any sense religious. The gift here is for a charitable purpose and is valid.

Stafford Crossman for the Attorney-General. The gift here is a good charitable gift. The General Fund is under the direction of a governing body, and is not applied at the discretion of the Archbishop. The gift is for the same purpose, whether it is applied by the governing body or by the Archbishop.

G. P. Slade for the next of kin of testatrix. This is not a good charitable gift. To find it to be charity, the Court must find that it was given for a charitable purpose, and for a charitable purpose only. It is impossible on the true construction of the will to say that the use of the Archbishop's discretion must necessarily be charitable. He might use the money provided by the gift to promote a newspaper or a political campaign having for its object the restoration of the Established Church in Wales. That clearly would not be a charity. The words here are not capable of a restrictive meaning: see Lord Hanworth M.R. in *In re Bain.* (5) In the same case Russell L.J. (6) deals fully with the whole question. This case is governed by *Dunne* v. *Byrne.* (7)

J. A. Reid for the Universities' Mission to Central Africa.

EVE J. [His Lordship stated the facts, and continued:] The difficulty arises from the use by the testatrix of the disjunctive "or" following a gift, which, on the evidence, is clearly a charitable one. Mr. Stafford Crossman suggests that the disjunctive only operates to discriminate between the agencies dispensing the gift—that it is to be handed to the Archbishop, who may pay it to the General Fund or himself apply it, and that in either case it is to be used for the same purpose which is a charitable one, in other words that the only distinction is, between the persons who are to administer it. I do not think that exhausts the operation of the disjunctive. No doubt the testatrix contemplates that the Archbishop will deal with it in one way or the other, but if he retains its administration in his own hands she has I think conferred upon him a discretion of a wide nature. It is to be applied by him "in any manner which he may think best for helping the work of the Church." Under this discretion would it be competent for the Archbishop to use the fund for purposes which are not charitable? I cannot see anything in the language which controls him in that respect. Any expenditure which he might in his discretion think best calculated for helping the work of the Church would, it seems to me, be within his discretion irrespective of the question whether it was of a charitable nature or not. That being so, I cannot help thinking that this case falls within the class of authorities upon which the Privy Council proceeded in the case of *Dunne* v. *Byrne*. (1) I think I must hold that the alternative here deprives the legatee of the right to receive this legacy on the ground that it is too indefinite, in that it cannot be said that the alternative application by the Archbishop must be for charitable purposes.

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(1) Ante, pp. 75, 79.

(2) Times Newspaper, July 21, 1922; [1930] 2 Ch. 80*n*.

(3) [1930] 1 Ch. 224.

(4) [1912] A. C. 407, 410.

(5) [1930] 1 Ch. 224, 232.

(6) [1930] 1 Ch. 236–7.

(7) [1912] A. C. 407.

Solicitors: *Taylor, Jelf & Co., for Perry, Son & Richards, Birmingham; Soames, Edwards & Jones, for Joseph Lloyd & Co., Rhyl; Raymond-Barker, Nix & Co.; The Treasury Solicitor.*

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(1) [1912] A. C. 407.

P. J. B.

Applied. *Re* Shepherd.
[1949] 1 Ch. 116

EVE J.

1930

July 18, 22, 23.

In re LAIDLAW.

WILKINSON *v.* LYDE.

[1929. L. 2421.]

Followed. *In re* Howell, decd.
[1952] 1 Ch. 264

Will—Construction—Legacy and Estate Duty—Direction that Legacies and Annuities "be satisfied paid and enjoyed free of death duties"—Incidence—Direction limited to Duties payable on Death of Testator.

A testator by his will directed that all legacies and annuities thereby given should be "satisfied paid and enjoyed free of death duties." A further direction therein contained was that in the event of the residuary estate exceeding 25,000*l.* certain legatees were to receive additional legacies of 1000*l.* each. The testator's estate at his death was of a value exceeding 500,000*l.*, and he bequeathed very large amounts in legacies, immediate and settled:—

Held, that as the will showed that the testator must have intended and contemplated that the value of his residuary estate would be exactly ascertained within a reasonable time, probably a year after his death, the direction as regards estate duty applied only to such duty as would become payable on the death of the testator himself and not to any duty which might accrue due in the future by reason of the dispositions of the will.

But as regards legacy duty the direction operated to free all legacies from duty, whenever payable.

In re Wedgwood [1921] 1 Ch. 601 applied.

In re Stoddart [1916] 2 Ch. 444 distinguished.

Originating Summons.

The testator Sir Robert Laidlaw by his will dated July 7, 1914, appointed the plaintiffs and the defendant D. L. Francis to be executors and trustees thereof. By para. 5 he created a trust fund of 140,000*l.* in priority to all other legacies and directed the income to be paid to his widow during her life, and after her death directed his trustees to divide the fund into seven parts and hold the same upon certain trusts for his children and step-children, and in addition gave his three daughters legacies of 18,000*l.* each and his three step-daughters legacies of 9000*l.* These legacies by para. 7 were settled upon the legatees, and their respective children or issue as they should by deed or will appoint and in default of appointment, equally between them at twenty-one or marriage with trusts over in default of children or issue.

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Clause 10 of the will was as follows: "All the legacies and annuities hereinbefore given shall be satisfied, paid and enjoyed free of death duties."

By clause 11 the testator gave all his residuary real and personal estate to his trustees upon trust for conversion and out of the proceeds to pay his funeral and testamentary expenses, death duties (including estate duty and increment value duty, if any) and debts, and if the residue of the money should exceed the sum of 25,000*l.* to pay to each of his brothers and sisters and sisters-in-law mentioned in clause 6 (*d*) of his will (by which they were given legacies) a further legacy of 1000*l.* free of duty, and to invest the balance of the residue and pay the income thereof to his widow during her life and after her death in trust for certain charitable institutions therein mentioned.

The testator died on November 3, 1915, and his will was duly proved by all the executors therein named in the Principal Probate Registry, the value of the residuary estate being then over 500,000*l.* Lady Laidlaw died on February 4, 1929, and the value of the residuary estate at her death was approximately 700,000*l.* All the testator's children and step-children named in the will were still living.

The summons raised the questions, having regard to the direction contained in clause 10 of the will, (1.) whether the executors ought to pay the legacy duty which became payable on the death of the testator's widow on the 140,000*l.* trust fund out of the residuary estate or whether it was payable out of the trust fund; (2.) whether the executors ought to set aside any and what sums out of the residuary estate to meet either the legacy duty or the estate duty which became payable on the deaths of the children and step-children of the testator in respect of their settled legacies, or whether both or either of the duties would be payable out of the settled legacies; and (3.) a similar question as to the legacy duty payable in the event of either of the children or step-children appointing, in exercise of a power contained in the will, a life interest in his or her settled legacy in favour of his wife or her husband, as the case might be. The

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summons raised two further questions which do not call for a report.

H. S. G. Buckmaster for the plaintiffs.

Gover K.C. and *Mark Potter* for the defendant Mrs. Lyde and other daughters and the step-children of the testator and their issue. Clause 10 of the will is a direction that all legacy duty and estate duty payable by reason of the dispositions of the will is to be paid out of residue. There is a long line of cases on the subject which are somewhat difficult to reconcile. The distinction between legacy duty and estate duty in this respect is discussed by Lord Sterndale M.R. in *In re Wedgwood.* (1) The liability for legacy duty payable on the death of a tenant for life arises at once, though the payment may be postponed, and the rate has not varied. But in the case of estate duty upon settled legacies a liability arises in the future, the rate has varied from time to time and the amount payable is uncertain.

The words of exoneration here used are very wide, and practically the same words except that "all" was added were the subject of the decision of Sargant J. in *In re Stoddart* (2), where that learned judge held that they were wide enough to cover all estate and legacy duty which became payable in the future.

It is remarkable that the testator should have assumed that his residuary estate might possibly not exceed 25,000*l.* when the corrected value amounted to 518,000*l.* and has increased considerably since his death, but he was evidently making provision for the payment of very heavy death duties.

[*In re Snape* (3); *In re Duke of Sutherland* (4); and *In re Jones* (5) were also referred to.]

Lionel Cohen K.C. and *Andrewes-Uthwatt* for other defendants interested in settled legacies supported this argument.

Jenkins K.C. and *Wilfrid Hunt* for the World's Sunday School Association, a charity taking a share in the residue.

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(1) [1921] 1 Ch. 601, 611.

(2) [1916] 2 Ch. 444.

(3) [1915] 2 Ch. 179.

(4) [1922] 2 Ch. 782.

(5) [1928] W. N. 227.

There are several passages in the testator's will that are of use in ascertaining the meaning of clause 10. The words "paid satisfied and enjoyed free of death duties" are not so strong that full effect cannot be given to them without providing for future estate duty of an uncertain amount which will become payable when the various settlements created by the will come to an end. "Paid" refers to pecuniary legacies whether settled or not, "satisfied" to specific legacies, and "enjoyed" to annuities.

Clause 11, which gives additional legacies to the testator's brothers and sisters upon the contingency of the residuary estate exceeding 25,000*l.*, is a strong indication that the testator intended the amount of his residue to be ascertained within a reasonably short time after his death, and it would be impossible to do so if future heavy and unascertained claims for estate duty are to be provided for: *In re Parker.* (1)

Gavin Simonds K.C. and *Alan Ellis* for other charities. The decision in *In re Wedgwood* (2) establishes a rule, as regards estate duty, that the presumption is that a testator is only providing for the payment of estate duty arising upon his own death, and that only the use of very clear language will hold up the administration of an estate for payment of all prospective death duties.

Stafford Crossman for the Attorney-General.

EVE J. By clause 10 of his will, dated July 7, 1914, the testator, Robert Laidlaw, who died on November 3, 1915, directed that all the legacies and annuities thereinbefore given should be satisfied paid and enjoyed free of death duties. The legacies are of various kinds, specific, immediate and settled, those coming under the latter two categories being of very large amounts. The annuities are small. The question raised is whether the operation of clause 10 is limited to the duties payable on the death of the testator or extends to legacy and estate duties which will become payable on the determination of various limited interests, in this case life interests, created in the settled legacies. It is one which

(1) (1917) 117 L. T. 422.

(2) [1921] 1 Ch. 601.

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frequently arises and has already been the subject of several reported cases. The interval which has elapsed since this case was argued yesterday has given me the opportunity of going through most of those cases and endeavouring to gain such assistance in the construction of this will as is to be gathered from the construction imposed on other wills. So far as the legacy duties are concerned, it may be taken, I think, as established that under such a direction the whole of these duties present and future fall to be discharged out of the residue, but in the case of the estate duty the presumption is that the testator only intended to provide for such duties as were payable on his own decease, and this presumption will not be rebutted unless on the construction of the whole will a clear intention on the part of the testator to provide for these future duties is disclosed. On behalf of those who assert that in this case there is established an intention on the part of the testator to extend the operation of the clause to future duties reliance is placed on the language of clause 10 itself, and in particular on the use of the expression "and enjoyed" after the word "paid." In support of this argument they rely strongly on the decision of Sargant J. (as he then was) in the case of *In re Stoddart.* (1) In that case, on the construction of the will he was there considering, the learned judge expressed himself thus: "I cannot help feeling deeply impressed by this, that, if the testator had desired that the pecuniary legacies settled on his relations should be enjoyed by them absolutely and entirely net, it would be very difficult for him to have used any more comprehensive words than those which are to be found in his will." On behalf of those interested in the settled legacies here it is urged that the language of clause 10 is quite as emphatic and comprehensive as that with which the learned judge was dealing, and that the wording of the respective clauses is practically indistinguishable; "enjoyed free of death duties" is, it is argued, not less effective than "enjoyed free of all death duties." I think however when one reads Sargant J.'s judgment it indicates that they were other

(1) [1916] 2 Ch. 444.

words on which he relied for the expression of opinion which I have read. In the will there were two material clauses numbered 7 and 8. Clause 8 contained a direction by the testator that his trustees were to hold the proceeds of his residuary estate upon trust, amongst other things, "to pay my funeral and testamentary expenses and debts and pay or provide for the legacies and annuities hereby or by any codicil bequeathed and the duties thereon." In his judgment the learned judge read clause 8 before turning to clause 7, and applying a well known rule of construction that as far as possible one must give effect to each expression used in the will, asked himself what was the meaning to be attached to the words "or provide for," and answered the query in these terms: "It is quite clear from the use of the words 'pay or provide for' in clause 8 of the will that the testator is contemplating the relief of the settled legacies from some duties which have not to be paid immediately on his death." Now I agree that according to the report the learned judge was at that time applying his mind more particularly to the question of legacy duty, and it may be said that this is sufficient to account for the passage I have just read; but it is quite obvious that both in the case of the legacy duty and the estate duty the learned judge approached the construction of the will with this in mind, that there was an expression used in clause 8 indicative of an intention on the part of the testator to relieve certain legacies from some duties which were not to be paid immediately on his death. When once you have reached the conclusion that the testator was contemplating the payment of future duties, it does not require much more to extend the benevolent intention so as to include not only legacy duty which could be paid but was not necessarily payable on his death, but also estate duty which could not be paid on his death. I am bound to bear in mind that there was that expression in clause 8 of that will. Then Sargant J. says (1): "Here the language of the testator in clause 7 of his will is extraordinarily wide and general. Mr. Austen-Cartmell has asked

(1) [1916] 2 Ch. 448.

me to read it as meaning that the legacies referred to in it are to be free of all duties arising in consequence only of the testator's death. So to read the clause would be unduly limiting its clear words. It will be sufficient for the pecuniary legatees if the words 'free of all death duties' are limited so as to mean 'free of all duties arising by virtue of the dispositions made by my will'; and I see no reason for limiting them, if I limit them at all, to any greater extent." The learned judge does not make any direct reference to or indeed say anything about the word "enjoyed" in his own judgment, beyond reading the words and commenting on their wide effect; but he in fact construes clause 7 in that will, which is in pari materia with clause 10 in this will, as meaning "free of all death duties arising by virtue of the dispositions made by my will." Now the conclusion at which I have arrived is that clause 10 contains an ambiguous expression. It is capable, and if it stood alone it might be capable only, of being construed as meaning the duties arising by virtue of the dispositions made by my will. If there are indications in the will that the testator intended it to be limited to the death duties payable in consequence of his own death, it is capable also of that construction, and what I have to ask myself is whether, with this ambiguous expression in clause 10, there is anything in the rest of the will assisting a possible construction one way or the other. There were in *In re Stoddart* (1) indications which certainly went to support the construction which Sargant J. put on the corresponding expressions there. There was the express inclusion of settled legacies in the direction; and there was the use of the words "to pay or provide" in the residuary clause. I do not think we have the same indicia here in support of a construction similar to that arrived at in *In re Stoddart.* (1) On the contrary, I think that there is in this will a provision with regard to the residuary estate which turns the balance the other way, in that it indicates that the testator contemplated and intended that the quantum of his residuary estate would be ascertained within a very reasonable time after his death,

(1) [1916] 2 Ch. 444.

probably within the executors' twelve months. It is rather a remarkable provision in the will of a testator whose property is of a value exceeding half a million and whose residuary estate, after providing for very large sums for legacies, both settled and otherwise, is of a very substantial amount; but in clause 11 he bequeaths a series of additional pecuniary legacies to certain relatives contingently upon his net residuary estate amounting to 25,000*l.* The provision has been relied upon by both sides: those who appear for the settled legatees point to it as proof that the testator must have contemplated a very much larger liability for duties than could have arisen if the payments out of residue had been confined to the duties payable on his own decease; on the other hand, on behalf of the residue it is said that this is mere supposition, there is nothing to support it in the will, and that the one thing it does establish is that the testator did not contemplate the amount of his net residue remaining an uncertain quantity for a wholly uncertain length of time. I think the argument on behalf of those protecting the residue prevails, and that the testator contemplated and intended that within the ordinary executors' year the estate would be free and the residue would be capable of ascertainment. That obviously could not be if there were these future unknown duties to be provided at various unascertainable dates. I hold therefore that in this case the rule in *In re Wedgwood* (1) must apply, and that the duties other than the legacy duties from which the legatees are relieved are the duties payable on the passing of the testator and not those which will accrue in the future.

Solicitors: *Kimber Bull, Howland, Clappé & Co.; Barlow, Lyde & Yates; Coward, Chance & Co.; Sanderson, Lee & Co.; Birkbeck, Julius, Edwards & Co.; The Treasury Solicitor.*

(1) [1921] 1 Ch. 601.

H. L. L.

CLAUSON J.

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May 14, 15, 29.

In re TONG.

HILTON *v.* BRADBURY.

[1929. T. 1087.]

Administration—Order of Application of Assets—Solvent Estate of deceased Testator—"Real and personal estate"—Income accruing after Death—"Property of deceased undisposed of by will"—Lapsed Share of Income—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 32, *sub-s.* 1; *s.* 34, *sub-s.* 3; *Schedule I., Part II., para.* 1.

A testator by his will, after directing his executors to pay all legacies free of estate duty and to pay out of his estate any duty which might become payable on any gift made before his decease and after bequeathing certain legacies and annuities and the use and benefit of two freehold cottages, directed them to collect the income from the remainder of his estate and to pay 75 per cent. thereof to E. H. during her life and on her death the income of the whole of the estate to be invested for the benefit of the children of M. and A. on their attaining the age of twenty-one years, and if there should be no children then the whole of the accumulated funds was to be divided between two named charities.

The testator died on March 12, 1929. It having been held upon the originating summons that, in consequence of the will having been attested by the husband of E. H., the 75 per cent. share of the income of the residuary estate was undisposed of by the will, until the death of E. H. or the birth of a child to either M. or A., the question then arose whether the testator's funeral, testamentary and administration expenses, debts and liabilities other than the estate duty in the will mentioned ought to be paid primarily out of such undisposed of income or out of the corpus of his estate:—

Held, first, that the "real and personal" estate of a deceased person made assets for the payment of his debts by s. 32, sub-s. 1, of the Administration of Estates Act, 1925, include the share of income of the testator's residuary estate accruing after his death as to which he died intestate. Secondly, that property "undisposed of by will," made by s. 34, sub-s. 3; Schedule I., Part II., para. 1, of that Act the primary fund for payment of the expenses debts and liabilities mentioned in that sub-section, includes a share of future income of residuary estate which lapses by reason of the statutory inability of the legatee to take under the will. Thirdly, that upon the proper construction of the will and the sub-section there was no provision for payment of the funeral, testamentary and administration expenses, debts and liabilities, with the result that those expenses and the debts and liabilities, except the estate duty in the will mentioned, must be paid primarily out of the share of income which lapsed and any other property undisposed of by the will.

ADJOURNED SUMMONS.

Livesey Tong by his will dated February 2, 1929, after directing his executors to pay all legacies free of estate or

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legacy duty and directing that any duty of any kind which might become payable on any gifts he might make before his decease should be paid out of his estate, bequeathed three legacies of 1000*l.* each and one of 500*l.* and certain annuities. The testator then bequeathed to the defendants, Sarah Anne Bradbury and Eliza Emily Bradbury, the use and benefit of two cottages and land at Dales Brow Swinton free of rent for as long as they cared to occupy one of the cottages, and if that property was sold then a small cottage to be provided for them out of the proceeds of the sale. The testator then directed his executors to collect the income from the remainder of his estate and to pay 75 per cent. of it to his sister, Mrs. Emmeline Holt, during her life and on her death the income of the whole of the estate to be invested for the benefit of the children of his two nieces, Monica Holt and Alice Tong, in equal shares on their attaining the age of twenty-one years, and, if there were no children, then the whole of the accumulated funds was to be divided between the Bolton and Leigh Infirmaries in equal shares.

The testator died on March 12, 1929, leaving real and personal estate of the value of about 45,000*l.* The will had been attested by the husband of Mrs. Emmeline Tong, with the result that there was a lapse of her share of income bequeathed to her during her life.

An originating summons was taken out for the determination of several questions which arose in the administration of the estate, and it was held (inter alia) that the 75 per cent. share of income of the residuary estate was undisposed of by the will until the death of Mrs. Holt or the birth of a child to either Monica Holt or Alice Tong, and the only question which calls for a report was whether the testator's debts and funeral and testamentary expenses and the duties on any bequests ought to be paid primarily out of such undisposed of income or out of the corpus of his residuary estate.

Allan Walmsley for the plaintiffs.

Gavin Simonds K.C. and *F. R. Evershed* for the defendant, Mrs. Emmeline Holt, one of the testator's statutory next of kin. The income accruing after the testator's death is not included in the expression "real and personal estate of a deceased person" within the meaning of s. 32, sub-s. 1, of the Administration of Estates Act, 1925, and are not assets for the payment of his debts and consequently cannot be applicable for the purposes mentioned in s. 34, sub-s. 3, and Part II. of Schedule I. If that future income is to be treated as applicable under those provisions of the Act, the share of income which lapsed, owing to the statutory inability of Mrs. Holt to benefit by the bequest, is not "property of the deceased undisposed of by will" within the meaning of para. 1 of Part II. of Schedule I. That expression applies only to property of which the testator has made no attempt to dispose. There are indications in the judgments of the members of the Court of Appeal in *In re Kempthorne* (1) which favour this view. Further, upon the true construction of the will provision is contained therein for the payment of the expenses, debts and liabilities. The "remainder of the estate" in the will mentioned means the residue of the estate after payment out of the estate of those expenses, debts and liabilities which fall to be paid out of the estate before the income can be collected and dealt with as directed by the will. It is true that in *In re Lamb* (2) there was no express provision, and that Eve J. held there was nothing in the will to exclude the statutory order of application of assets, but in *In re Kempthorne* (1) Lawrence L.J. said he was not convinced of the correctness of the decision in *In re Lamb* (2), and his reasoning seems to favour the view we are submitting—namely, that this will does contain such a provision as is referred to in s. 34, sub-s. 3, through the use of the words "remainder of the estate," a provision which is sufficient to exclude the statutory order of application. Having regard to the view taken by the Court of Appeal of the decision in *In re Lamb* (2) this Court is not fettered by that decision.

Alexander Grant K.C. and *Lavington* for the defendant Alice Tong, another of the testator's statutory next of kin, supported the last argument. Further, the income accruing

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(1) [1930] 1 Ch. 268.

(2) [1929] 1 Ch. 722.

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after the testator's death cannot be included in the expression "real and personal estate of the deceased," as the provisions of s. 33 do not appear to be applicable to such income, but can only be applicable to corpus of the estate.

Norman Daynes for the defendants, the two charitable institutions. The "remainder of the estate" in this will comprises what remains after the payments have been made which the testator himself has directed by his will should be made out of his estate. The decision in *In re Lamb* (1) stands unaffected by anything that was decided or said by the Court of Appeal in *In re Kempthorne.* (2) In *In re Lamb* (1) there was a mere direction to pay the testator's debts, funeral and testamentary expenses; there was no such provision for their payment as that which was within the intention of s. 34, sub-s. 3, of the Act.

G. D. Johnston and *R. F. Roxburgh* for other defendants interested.

Cur. adv. vult.

May 29. CLAUSON J. When the summons came before me, it appeared that in consequence of the will having been attested by the husband of Mrs. Holt there was an intestacy as regards 75 per cent. of the income during the life of Mrs. Holt. It may hereafter turn out that there is an intestacy as to some further interest in the estate. The question was then raised (and it is on this point that I reserved judgment) how the testator's real and personal estate, he having died solvent, ought to be applied towards discharge of his funeral, testamentary and administration expenses, debts and liabilities, in view, in particular, of his intestacy as regards this share of income. Sect. 34, sub-s. 3, of the Administration of Estates Act, 1925, provides that, subject to the provisions, if any, contained in the testator's will, the application is to be in the order mentioned in Part II. of the First Schedule to the Act.

It was argued in the first place, as I understood it, that the share of income in question could not be treated as real and

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(1) [1929] 1 Ch. 722.

(2) [1930] 1 Ch. 268.

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personal estate of the testator, as it is a fund which only comes into being after his death. There is no definition in the Act of "real and personal estate," but when I find it declared in s. 32, sub-s. 1, that the real and personal estate of a deceased person and that disposed of by him in pursuance of a general power are assets for the payment of his debts, I can feel no doubt that the assets with the administration of which, as appears by its heading, Part II. of the First Schedule to the Act deals, comprise the assets which, immediately before the Act it was the executors' duty to administer, and it is of course elementary that such assets include assets which, though treated as and spoken of as part of his estate after his death, were not actually his property while he was alive. The most familiar class of such assets are assets by increase, such as, to take the classic example, the lambs born to the testator's sheep after his death: see Williams on Executors, 10th ed., vol. ii., p. 1279. I cannot think that by speaking throughout this part of the Act of that which is to be administered for the payment of the deceased's debts and liabilities as "the real and personal estate" of the deceased, the Legislature intended to discard the long settled rule of law that various categories of assets which were never in the deceased himself, for example, assets by contract, by remainder, by increase or by condition (see Williams on Executors, pp. 1279 to 1283) are nevertheless regarded as part of the deceased's estate and as assets for payment of debts, and intended to add to the complications of a difficult subject by providing for the administration of such assets as actually passed on the deceased's death, and omitting to provide for the administration of these other categories of assets which the law for centuries has regarded as assets of and part of the estate of the deceased. It seems to me, therefore, impossible to confine the expression "real and personal estate" to that which is actually vested in the deceased at the moment of his death. Further it is well settled (see *Weatherall* v. *Thornburgh* (1); *In re Travis* (2)) that

(1) (1878) 8 Ch. D. 261.

(2) [1900] 2 Ch. 541.

income of a testator's residue accruing after many years after his death in regard to which his dispositions are avoided by the Thellusson Act (39 & 40 Geo. 3, c. 98), pass as on an intestacy; and that can only be, because they are part of the estate of the testator as to which he happens to die intestate. I accordingly fail to see how future income of the deceased's estate can fail to come within the expression "real and personal estate" for the purposes at all events of this part of the Act.

Taking, as I do, the view that I must read "real and personal estate" in s. 34, sub-s. 3, as including this share of future income in regard to which there is an intestacy, I must next construe the will to see whether there is in it any provision dealing with the discharge of the funeral, testamentary and administration expenses, debts and liabilities of the deceased. In this will I find no reference to funeral expenses or to debts or liabilities; there is a direction to pay duty on gifts made by the testator in his lifetime, but these would not be debts or liabilities of the testator, but of the recipients of the gifts, and the direction amounts to a legacy to those recipients of a sum equal to the duty which they have incurred. I find a direction to pay all legacies free of estate duty, and I think I may fairly construe this as a direction that all estate duty shall be paid out of his estate. When I come to the final gift I find a disposition of the "remainder of my estate." This I construe, in view of the preceding reference to estate duty, as a direction to pay the estate duty and the legacies out of the general estate before ascertaining the fund which is the subject-matter of the final gift; but I can find no direction dealing with funeral, testamentary and administration expenses, debts and liabilities, other than and except this estate duty. In order to ascertain how these expenses, debts and liabilities must be met I must, by reason of s. 34, sub-s. 3, of the Act turn to Part II. of the First Schedule. From that I find that the fund to be applied first in meeting these expenses, debts and liabilities is "property of the deceased undisposed of by will subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." Now in view of the will, which, as I have construed it above, provides for the payment out of the general estate of the legacies before the "remainder" which is the subject-matter of the final gift is ascertained, I need not concern myself with the provision as to the retention of a fund to meet legacies. It seems to follow that the fund primarily liable to meet these expenses, debts and liabilities must be property of the deceased undisposed of by the will. The share of income which lapses by reason of the statutory inability of Mrs. Holt to take it seems to me to be property undisposed of by will, and the same, I would add parenthetically, would be true of any share of income which might have to be dealt with as on an intestacy by reason of the Thellusson Act, a point which may possibly hereafter be found to be material in the present case.

The suggestion as against this conclusion was, as I understood it, that the expression "property undisposed of by will" is not synonymous, as it appears to me to be, with "property in respect of which the deceased dies intestate," but is equivalent to the expression "property which the deceased has not attempted to dispose of by his will." Even if the point had not been covered by authority I should have been prepared to hold the suggestion unsound, first because, according to the ordinary use of language among lawyers, property ineffectually disposed of by will is commonly spoken of as "undisposed of by will," and, secondly, because I hesitate to attribute to the Legislature the intention of introducing for no apparent reason a fresh complication into this branch of law, by differentiating for the first time between that which passes as on an intestacy, because the testator has not attempted to dispose of it, and that which passes as on an intestacy, because the attempted disposition has failed by reason of some statutory provision, as in the present case, or by reason of the fact of a beneficiary predeceasing the testator, as in *In re Atkinson.* (1) Fortunately my present opinion on the matter is of no moment since, as it seems to me, the point is decided in favour of the view which I am disposed to take by authority which is binding upon me. The exact point was argued before Eve J. in *In re Lamb.* (1) It was suggested there by counsel for the next of kin that "property undisposed of by will" means "property which the testator has not attempted to dispose of by will." Eve J. says (2): "It was argued on behalf of the next of kin that 'property of the deceased undisposed of by will' must be confined to property to dispose of which no attempt has been made by the will, and ought not to be read as including a share of residue which has lapsed by reason of the legatee's death in the lifetime of the testator, also that the Legislature ought not to be presumed to have intended to effect so material a change in the pre-existing practice by the passages to which I have referred. But the language is plain and unambiguous —a lapsed share of residue is properly described as property undisposed of by will, and the change is not more drastic than others brought about by other parts of the Act. Moreover it is to be borne in mind that the order of application may be varied by the will." In *In re Atkinson* (3) it became necessary for me, incidentally, to construe the words "property undisposed of by will," and I treated the opinion of Eve J. as binding on me. The point came up incidentally in *In re Kempthorne* (4), in which case Maugham J. stated he had no doubt that the words "property of the deceased undisposed of by will" would cover a lapsed share of residue.

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(1) [1930] 1 Ch. 47.

It was however suggested that the opinions of the members of the Court of Appeal in *In re Kempthorne* (4) were so expressed as to make it proper for me to come to a conclusion opposite to that heretofore adopted by Eve and Maugham JJ. and myself. The Master of the Rolls pointed out (5) that the question was not relevant on the point which was before the Court and that the Court had had no argument on the point. That seems conclusively to show that he at all events did not regard himself as overruling the opinions I have mentioned. Lawrence L.J. reserved his opinion, but, as I read it, his doubts about the correctness of the decision in *In re Lamb* (1)

(1) [1929] 1 Ch. 722.
(2) Ibid. 724, 725.
(3) [1930] 1 Ch. 47.
(4) [1930] 1 Ch. 268.
(5) [1930] 1 Ch. 296.

arose not from any point as to the meaning of the words "undisposed of by will," but on the question whether, on the true construction of the will in that case, the residue, a share of which had lapsed, was anything other than that which was left after the debts and funeral and testamentary expenses and legacies, all of which had been mentioned earlier in the will, had been paid. If on the true construction of the will the residue meant that which was left after the debts and funeral and testamentary expenses and legacies had been paid, the will itself would have made provision for the discharge of those payments, and recourse to Part II. of the Schedule would be unnecessary. I do not find anything in the judgment of Russell L.J. to cast any doubt on the correctness of the view taken by Eve and Maugham JJ. and myself on the matter with which I am concerned.

For these reasons I am of opinion that the testator's funeral, testamentary and administration expenses, debts and liabilities, other than the estate duty in his will mentioned, ought to be paid primarily out of any property of his undisposed of by will, including the share of income of his residuary estate directed to be paid to the defendant Mrs. Holt, which has lapsed by reason of her husband having attested the will. It was pointed out that such a decision would be inconvenient, since it makes a fund accruing in the future the primary fund for discharging payments which have to be made at once. That may be so, but on the language of the Act the inconvenience, should it exist, cannot be avoided. I am not convinced that the inconvenience is serious in the present case. Debts will be paid out of the general estate. As income accrues a recoupment pro tanto will gradually be made to the capital of the residue to replace the amount used in paying debts, and it will only be the income remaining after this recoupment which will be available for distribution as on an intestacy.

Solicitors: *Winder & Holden; Pritchard, Englefield & Co., for Butcher & Barlow, Bury; Richardson Sowerby, Holden & Co.; Kinch & Richardson, for Hayward & Son, Leigh, Lancs; Gregory, Rowcliffe & Co.*

H. C. H.

In re NEWMAN.

SLATER *v.* NEWMAN.

[1930. N. 945.]

FARWELL J.

1930
July 10.

Law of Property—Undivided Share of Land—Specific Devise in 1922—*Statutory Trusts imposed in* 1926—*Testator's Death in* 1929—*Construction of specific Devise — Conversion — Ademption — Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 35; *Schedule I., Part IV., para.* 1 (2.).

In 1922 the testator and his brother John were seised of Blackacre as tenants in common in fee simple in equal undivided moieties.

By his will dated May 15, 1922, the testator specifically devised "all my moiety or equal half part or share and all other my share in" Blackacre to John.

On January 1, 1926, the Law of Property Act, 1925, s. 35, and Schedule I., Part IV., para. 1 (2.), came into operation, and Blackacre thenceforth vested in the testator and John as joint tenants on the statutory trusts for sale.

On January 29, 1929, the testator died without altering or confirming his will:—

Held, that the specific devise was adeemed by the imposition of the statutory trusts, and John took nothing thereunder.

In re Mellish (stated in) [1928] W. N. 226; reprinted [1929] 2 K. B. 82; *In re Wheeler* [1928] W. N. 225; reprinted [1929] 2 K. B. 81; and *In re Lowman* [1895] 2 Ch. 348 distinguished.

In re Kempthorne [1930] 1 Ch. 268, 283, 289, 293 applied.

ORIGINATING SUMMONS.

At the date of his will the testator and his brother John were entitled to certain freehold property in Rose Alley and Bear Gardens, Southwark, as tenants in common in equal undivided moieties.

By his will dated May 15, 1922, the testator, described as of Bear Gardens and Rose Alley, Southwark, appointed his brothers, John and Charles, and the plaintiff, executors and trustees. After giving certain pecuniary legacies he devised unto and to the use of John his heirs and assigns "all my moiety or equal half part or share and all other my share in the factory and hereditaments situate at Rose Alley and Bear Gardens aforesaid, upon part of which my firm of E. Newman & Sons carry on business and the other part of which is now in the occupation of Hayes Wharf, Ld., as underlessee thereof" to hold the same for his own beneficial and absolute use subject however to the condition that he should pay to Charles during his life one-fourth part of the rental from time to time accruing from the said freehold premises in Rose Alley and Bear Gardens. Should Charles predecease the testator or survive him and predecease Charles' then present wife John should pay Charles' then present wife one-eighth part of the rental during her life. On the death of Charles and his then present wife the moiety of the said freehold premises was to belong absolutely and unconditionally to John.

The above condition was in no way to prevent John from selling "the said freehold premises," but in the event of a sale he was to pay Charles or his then present wife, as the case might be, a sum equivalent to the one-quarter or one-eighth share of rent, as the case might be, based on the average yearly rents between the testator's death and the sale.

The testator then devised and bequeathed his real and personal estate "except what I otherwise dispose of by this my will or any codicil hereto" to his trustees upon trust for sale and conversion and to stand possessed of the net proceeds (after payment of funeral and testamentary expenses debts and legacies) upon trust to pay the same to the testator's four sisters in equal shares.

On January 1, 1926, the Law of Property Act, 1925, s. 35, and Schedule I., Part IV., para. 1 (2.), came into operation, and the property vested in the testator and John as joint tenants on the statutory trusts for sale.

In 1928 the testator and John agreed to sell the Bear Gardens portion to a purchaser for 17,500*l.* on the terms that 2500*l.* should be paid in cash and 15,000*l.* remain on mortgage repayable by annual instalments of 2000*l.* The purchase was duly completed under the trust for sale, and on March 24, 1928, the purchaser executed an instrument of charge securing 7500*l.* apiece to the testator and John repayable by instalments of 1000*l.* apiece on March 25 in each year, of which the 1929 and 1930 instalments were duly paid. The Rose Alley portion of the property still remained unsold.

On December 29, 1929, the testator died, without altering or confirming his will, leaving John, Charles and his wife, and his four sisters surviving him. The will was proved by all three executors.

On May 21, 1930, the plaintiff (the independent executor) issued this summons to determine (inter alia)

(1.) Whether the devise was adeemed in toto by the imposition of the statutory trusts in the testator's lifetime.

(2.) If nay, whether the Bear Gardens devise was adeemed by the sale of that property under the statutory trusts in the testator's lifetime.

R. M. Pattisson for the plaintiff.

Sir Thomas Hughes K.C. and *Watmough* for the specific devisees. On the first point, having regard to *In re Kempthorne* (1), it is useless in this Court to contend that the imposition of the statutory trust for sale was mere conveyancing machinery intended to facilitate dealing with the legal estate, but not intended to affect equitable interests behind the curtain.

In re Kempthorne (1), however, was not a case of ademption. There was a general devise of freeholds, and a general bequest of personalty, and the question was merely into which category an undivided share of freeholds fell.

This is a case of a specific devise, and it is not adeemed by the statutory conversion: *In re Mellish* (2), followed in *In re Wheeler.* (3) *In re Mellish* (2) is unfortunately not separately reported, but its effect is clearly stated in *In re Wheeler.* (3) A specific devise of land as such (though really subject to a trust for sale) passes the proceeds of sale: *In re Lowman.* (4)

[FARWELL J. That was a case of misdescription, not ademption. The trust for sale existed at the date of the will. Here it is imposed subsequently.]

For other ademption cases see Theobald on Wills, 8th ed., pp. 180–182.

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(1) [1930] 1 Ch. 268.

(2) [1928] W. N. 226; reprinted [1929] 2 K. B. 82; 141 L. T. 322*b*.

(3) [1928] W. N. 225; reprinted [1929] 2 K. B. 81; 141 L. T. 322.

(4) [1895] 2 Ch. 348.

If we succeed on the first point we still have to deal with the sale of Bear Gardens. Now that transaction merely converted the fee simple in Bear Gardens into a 3000 years mortgage term. Surely that ought to pass by the devise: *In re Carter* (1), distinguishing *In re Clowes.* (2)

Vaisey K.C. and *Droop* for the residuary legatees. The simple question is, what do the words of the will mean in the events that have happened? Does the specific devise pass the proceeds of sale into which the land was subsequently converted by the statutory trusts? On the language of the will it is clear that the devise passed the land as such, and contemplated a subsequent sale by John. After the imposition of the statutory trusts no land as such was left. That is a clear ademption.

As to the authorities. In *In re Mellish* (3) the testator devised "all his share and interest" in specific land. He had a mixed interest—namely, one-ninth of the whole land and one-ninth of the proceeds of sale of one-third. Eve J. held on construction that that interest passed.

[*Pattisson.* I ought perhaps to mention that *In re Mellish* (3) is discussed in 164 L. T. Journal, p. 23.]

In *In re Wheeler* (4) the will was confirmed by a codicil after the Act. That made all the difference. The cases are not overruled by *In re Kempthorne* (5), but they are pure cases of construction of the particular wills.

They also referred to *In re Price.* (6)

Watmough in reply. Rose Alley is still there. It is no doubt subject to the trust for sale, and is notionally personalty. But is it conceivable that a consideration of that sort can prevent the specific devise from taking effect? Surely it passes to the specific devisees, subject to the trust for sale.

FARWELL J. [after stating the facts :] After the imposition of the statutory trusts for sale on January 1, 1926, the testator did not alter or confirm his will, nor did he do so after the sale of Bear Gardens. I have therefore to consider the effect of that will having regard to the subsequent events. Now in this Court it cannot be disputed that the real estate was converted into personalty by the imposition of the statutory trusts, and the freehold moiety became a moiety of the proceeds of sale. Prima facie I should have thought that where there was a specific devise of real estate, and that real estate was converted by statute into personalty during the testator's lifetime, the devise did not take effect. The first question is whether the Act has this operation. The answer to that depends first on the actual language of the will. That is a most important consideration. Secondly, it depends on the authorities.

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(1) [1900] 1 Ch. 801.

(2) [1893] 1 Ch. 214.

(3) [1928] W. N. 226; reprinted [1929] 2 K. B. 82; 141 L. T. 322*b*.

(4) [1928] W. N. 225; reprinted [1929] 2 K. B. 81; 141 L. T. 322.

(5) [1930] 1 Ch. 268.

(6) [1928] Ch. 579.

Now on the actual language of the will it is clear that the testator is devising real estate as such. It is true he has only an undivided moiety, but he is plainly devising that moiety as real estate. He devises his moiety of the "factory and hereditaments," describing their occupation; then he refers to the rental of "the said freehold premises" and so on, and it is quite impossible for me to construe the gift as "a devise or bequest of the moiety of real estate or of the personalty into which it may be converted." I must construe the devise as a devise of the actual real estate. The statutory trusts have converted that into personalty. Unless therefore there is anything in the authorities to compel me to the contrary, in my judgment the devise is defeated, because the subject-matter has ceased to exist, the testator having no longer any share in the real estate, but only in the proceeds of sale.

I now come to the authorities. The first is *In re Mellish* (1) before Eve J. This was unfortunately not separately reported, but its effect is stated in *In re Wheeler.* (2) In *In re Mellish* (1) the testator devised all his share "and interest" in the Rushall estate to the defendant. He had one-ninth undivided share of that estate and another one-ninth share of the proceeds of sale of another one-third. Eve J. held that the devise was not adeemed by the statutory trusts, but his reasons are not given. It may well be that he was able to treat the word "interest" as passing the proceeds of sale of the first one-ninth. If that was the ground the case does not assist me, as here the word "interest" is absent.

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(1) [1928] W. N. 226; reprinted [1929] 2 K. B. 82; 141 L. T. 322*b*.

(2) [1928] W. N. 225; reprinted [1929] 2 K. B. 81; 141 L. T. 322.

A similar question arose in *In re Wheeler.* (1) That was mainly a question as to the incidence of estate duty on an undivided share of real estate, devised before January 1, 1926, the will being confirmed after that date. Tomlin J. followed Eve J. without expressing his own opinion, but the confirmatory codicil may have helped him. I do not suggest that either decision was wrong, but they are clearly distinguishable on the grounds of the word "interest" and the "confirmation by codicil" respectively.

The point was also considered in *In re Kempthorne.* (2) That however was not quite on all fours, as it was not the case of a specific devise. The testator had made a general devise of his real estate in one direction and a general bequest of his personalty in another. The question was into which category an undivided share of real estate fell.

Maugham J. (3) followed *In re Price* (4), and held that the undivided share passed as personalty. He distinguished *In re Mellish* (5) on the ground of the word "interest," and treated *In re Wheeler* (6) as merely a decision as to the incidence of estate duty. The Court of Appeal affirmed Maugham J.'s decision on this point, and held that the statutory trusts converted the undivided share of real estate into personalty. Their decision does not actually cover the present case, but it is of great assistance.

In an interlocutory observation Russell L.J. said (7): "The appellant's difficulty is that the trust for sale operated as a conversion and that there is nothing in the statute to cause a reconversion." That exactly applies here.

Lord Hanworth M.R. said (8): "There remain two other cases which have been cited to us. One is *In re Wheeler* (1), and the other is *In re Mellish* (2), which is referred to in *In re Wheeler.* (1) Neither of those cases to my mind covers the point that we have to decide. In *In re Mellish* (2) Eve J. held that there was an effective devise, which was not altered by the Law of Property Act. The terms of the devise there were: 'All his share and interest in an estate known as the Rushall estate in the county of Stafford to the defendant Buchanan in fee simple.' Eve J. held that those words were sufficient to constitute a definite devise of the undivided shares of that estate which had belonged to the testator, and took effect as a bequest of all the testator's interest therein and the proceeds of sale thereof. In *In re Wheeler* (1) Tomlin J. held that the words in the case before him were sufficiently similar to those in *In re Mellish* (2) to justify his deciding in the same way as Eve J. The gift in that will was of the testator's interest 'in an undivided moiety of the real estate in the county of York.' Tomlin J. held that s. 16, sub-ss. 4, 5, operated, and that Sir Delaval Cotter took the estate indicated and was bound to repay under sub-s. 5 of s. 16 the duty which had been paid in respect of it.

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(1) [1928] W. N. 225; reprinted [1929] 2 K. B. 81; 141 L. T. 322.

(2) [1930] 1 Ch. 268.

(3) [1930] 1 Ch. 274.

(4) [1928] Ch. 579.

(5) [1928] W. N. 226.

(6) [1928] W. N. 225.

(7) [1930] 1 Ch. 283.

(8) [1930] 1 Ch. 289.

"Those two cases are to my mind based upon the interpretation given to the gifts in the two wills which the two learned judges found to be specific bequests. We, however, have to deal with a devise in general terms of 'All my freehold and copyhold property.' Those general words must be construed in accordance with the directions of the Legislature in the new statutes. Inasmuch as the land in which the testator owned undivided shares is subjected to a trust for sale, the general devise is not adequate to cover the proceeds of sale. The property has been turned into personalty, with the result that this devise fails."

Lawrence L.J. (3) did not in terms deal with either of these cases.

Russell L.J. said (4): "That being so, the next question which arises is what is the effect of the Act upon the disposition made by this testator in his will? That has been called the ademption point; but I am not sure that that is a strictly accurate description. The position is this. The testator has died leaving a will in which he makes a disposition in general terms of 'all my freehold property,' and also makes a general disposition of all his personal estate. The question is which of those two dispositions carries this particular interest of the testator? When once the conclusion is reached that the effect of the Act is to turn his freehold property so far as it consisted of undivided shares into personal estate, there can be only one answer to the question—namely, that the property passes under the general gift of the testator's personal estate.

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(1) [1928] W. N. 225.
(2) [1928] W. N. 226.
(3) [1930] 1 Ch. 268, 290.
(4) [1930] 1 Ch. 268, 293.

"I desire to add nothing to the judgment of Clauson J. in *In re Price* (1), which was adopted and approved of by Maugham J. in his judgment in the present case. (2)

"As regards the two other cases . . . . before Eve J. and Tomlin J., they are in my opinion distinguishable. So far as *In re Mellish* (3) . . . . is concerned, the terms of the disposition . . . . were such as to cover the interest, whether it was freehold property or . . . . personal estate. The gift there was of 'all the testator's share and interest' in a certain estate.

"In *In re Wheeler* (4) . . . . the distinguishing feature . . . . was that although the testator's devise was of all his real estate and undivided moiety of his real estate in the county of York, he had, after the Act had been passed, made a codicil by which he confirmed his will; so that his testamentary disposition had to be treated as one made at the date of the codicil. The learned judge must necessarily have taken the view that, when the testator used that language, he must have been intending to apply it to the interest, whatever it was, which he had in the real estate or undivided share of real estate in the county of York.

"Those two cases are in my opinion distinguishable, but if they do by any chance conflict with the decisions of Clauson J.

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(1) [1928] Ch. 579.

(2) [1930] 1 Ch. 268, 274.

(3) [1928] W. N. 226.

(4) [1928] W. N. 225.

FARWELL
J.

1930

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in *In re Price* (1) and of Maugham J. in the present case (2), I prefer their views to any views inconsistent with them, which may be involved in the decisions in the other two cases."

α That means that *In re Mellish* (3) turned on the construction that Eve J. was enabled to give to the words "share and interest" as passing the converted undivided share; and *In re Wheeler* (4) turned on the confirmation by codicil, and that possibly both cases ought to have been differently decided.

The result is this. If the testator uses language that can only be construed as a devise of real estate, and, notwithstanding the imposition of the statutory trusts, he dies without altering or confirming his will, the conversion effected by the statutory trusts adeems the devise, because there is nothing left for that devise to operate on. If on the other hand the testator uses language wide enough to carry any interest in the property whether it be in law real or personal property, the conversion is immaterial.

I have therefore to determine the true construction of the testator's language in the present case. It is in my judgment not apt to pass anything but a moiety of real estate, and as there is no real estate left the devise does not operate. It may well be that this result is not in accordance with what the testator would have intended if he had considered the matter, but I am not concerned with that. I am only concerned with his language, i.e., his expressed intention. The whole devise therefore fails.

It is not therefore necessary to determine the second question as to the subsequent sale of Bear Gardens, but as the case may go further I had better express my view, which is, that even if the specific devise is not totally adeemed by the imposition of the statutory trusts, the Bear Gardens portion was certainly adeemed by the sale by the testator and John under those trusts, although a large portion

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(1) [1928] Ch. 579.
(2) [1930] 1 Ch. 268, 274.
(3) [1928] W. N. 226.
(4) [1928] W. N. 225.

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of the purchase money was left on mortgage: see *In re Clowes.* (1)

Solicitors: *Stock & Slater; J. Tickle & Co., for D. W. Harrison, Bexhill-on-Sea.*

G. R. A.

EVE J.
1930
July 24.

In re JACQUES SETTLED ESTATES.

[1930. J. 959.]

Settled Land—Tenant for Life—Electric Light Installation in Mansion House—Expenditure by Tenant for Life—Installation effected before January 1, 1926—*Improvement not authorized under Settled Land Acts,* 1882 *to* 1890 —*Claim for Recoupment under Settled Land Act,* 1925, *by Tenant for Life—Repayment by Instalments—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 83, 84, 85, 87 *and* 88; *Third Schedule, Part III.*

In 1919 the tenant for life of settled land effected the installation of electric light in the mansion house and adjoining cottages, which had previously been lit by oil lamps. The cost of the installation was paid by the tenant for life out of his own money.

The tenant for life now asked the Court to authorize the trustees of the settlement to apply out of capital moneys the cost of the installation, the amount of such cost to be repaid to them out of the income of the settled land in fifteen years from the date of the order in half-yearly instalments:—

Held, that the improvement being one that would have had to be made sooner or later, the order asked for should be made, repayment to be made by twenty half-yearly instalments, whereof the first must be regarded as having fallen due on June 30, 1926.

ADJOURNED SUMMONS.

The plaintiff was the tenant for life of certain settled property in Yorkshire. Before 1919 the manor house and adjoining cottages were lit by oil lamps. In that year the plaintiff had electric light installed at a total cost of 1951*l.* 18*s.* 7*d.*, which he paid out of his own money, comprised of the sums of 223*l.* 13*s.* 7*d.* paid for the erection of a shed for electric plant, 1678*l.* 5*s.* for the installation of a turbine, generator, switch board, battery, wiring, mains, timber, carboys, belting and other plant, and 50*l.* to a consulting engineer for superintending the work.

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(1) [1893] 1 Ch. 214.

The plaintiff by this summons asked the Court to authorize the trustees of the settlement to apply out of capital moneys the sum of 1951*l.* 18*s.* 7*d.*, such sum to be repaid to them out of the income of the settled land in fifteen years from the date of the order by half-yearly instalments.

Manning K.C. and *A. Adams* for the plaintiff. The cost of these improvements could not have been allowed the tenant for life under the Settled Land Act of 1882: *In re Lord Leconfield's Settled Estates.* (1) They do, however, come directly under Part III. of the Third Schedule to the Act of 1925, and the sections of that Act, ss. 83, 84, 85 and 87, dealing with improvements, are retrospective: *In re Lord Sherborne's Settled Estate.* (2) The plaintiff is, therefore, entitled to the order he asks for, although the improvements were executed some years before the Act of 1925 came into force. He also claims, under s. 84, sub-s. 2 (ii.) (*a*), fifteen years from the date of the order in which to repay the amount allowed.

C. E. Harman for the remaindermen. It cannot be denied that the Court has power to make the order asked for, but by doing so it would create a dangerous precedent. Every tenant for life would come to the Court to ask for a like order in respect of any improvement he had made of like nature during the last twenty-five years. In *In re Lord Sherborne's Settled Estate* (2) was a case where the tenant for life executed various improvements extending over a number of years, and it does not apply to the present case. *In re Ormrod's Settled Estate* (3) is more nearly in point. The plaintiff paid for these improvements some years ago when he had no expectation that he would ever be recouped, and he was not embarrassed then and he is not embarrassed now by such payment. The Court should not, in its discretion, grant this application.

(1) [1907] 2 Ch. 340.

(2) [1929] 1 Ch. 345.

(3) [1892] 2 Ch. 318.

Manning K.C. in reply. This is a much stronger case than *In re Lord Sherborne's Settled Estate* (1), where the expenditure was incurred in improving the electric installation.

Winterbotham for the trustees of the settlement.

Eve J. The question I have to determine is: whether, seeing that the expenditure was incurred at a time when it could not be paid for out of capital, that since January 1, 1926, it is an expenditure which can be provided for primarily out of capital, and that it has now been decided that the provisions in the Settled Land Act, 1925, making the work done an improvement which can be provided for primarily out of capital operate retrospectively, I ought to make an order the effect of which will be to reimburse the tenant for life all or any and if any what part of an expenditure which he incurred at a time when he could have had no expectation of any relief being afforded him in respect thereof out of capital.

Speaking for myself, I think that the opinion expressed by North J. in *In re Ormrod's Settled Estate* (2) is a very salutary one to bear in mind in connection with applications of this nature. He had there to deal with the question of recouping a tenant for life for certain expenditure he had incurred without having submitted antecedently a scheme of his proposals to the trustees, and the learned judge, who was prepared to assume that s. 15 of the Settled Land Act, 1890, authorizing the recoupment of expenditure incurred without a scheme was retrospective, nevertheless refused to allow recoupment, on the ground that the tenant for life had deliberately done the work with the object, no doubt, of benefiting the estate, but with the full knowledge that the money expended could not be recovered from capital, and that in these circumstances he must be presumed to have intended to make the expenditure his own, and not to cast it upon the corpus of the estate. I think that is a precedent to be borne in mind when applications are made under the present Act for the retrospective exercise by the Court of its discretion in

(1) [1929] 1 Ch. 345.

(2) [1892] 2 Ch. 318, 326.

favour of tenants for life. I can imagine a large number of improvements, especially those which do not cost much individually, but which in the aggregate may amount to a large sum, with respect to which the Court would not exercise its discretion by giving a retrospective effect to the legislation of 1925, but would leave the tenant for life who had incurred those expenses without any idea of getting them back in the position in which he must have known himself to be when the expenditure was incurred.

I confess that I am very much pressed in this case with the observations of North J. The tenant for life installed this electric lighting system at a time when I must presume that he and his advisers knew that it was impossible for him to recover the cost from the capital moneys, and I am fairly certain that he remained under that impression not only until the Settled Land Act of 1925 came into force, but until he learnt, or his advisers learnt, from the decision of Tomlin J. in *In re Lord Sherborne's Settled Estate* (1) that the provisions of that Act were of a retrospective nature.

There are however features in this case which commend the expenditure as meritorious. Having regard to the antiquated system of lighting in vogue as late as 1919 I think that sooner or later and sooner rather than later there must have been an installation of electricity, and had an application for the cost of such an installation been made subsequent to the Act of 1925, there cannot, I think, be any doubt but that it would have been sanctioned under sub-s. 2 (*a*) of s. 84. Moreover the work appears to have been well done and the installation to have been satisfactorily maintained.

I do not however intend to go to the length which the summons asks, which is that although this expenditure was incurred in 1919, the instalments to be paid out of income for recouping capital should commence to be payable as from the date of the order, and should extend over the next fifteen years. I do not think that would be right. I think that I ought to regard this as though it were an application made immediately after the coming into force of the Act of

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(1) [1929] 1 Ch. 345.

1925, and that the repayment of the 1951*l.* 18*s.* 7*d.* which the trustees will be authorized to treat as payable out of capital must be made by twenty half-yearly instalments, whereof the first must be regarded as having fallen due on June 30, 1926.

Solicitors: *Rickards, Fox & Co.*; *Atkey, Turner & Co.*

P. J. B.

CLAUSON J.
1930
April 14.

ELDER *v.* NORTHCOTT.

[1928. E. 1452.]

Limitation, Statute of—Claim Barred as to Principal—Interest, Recovery of—Interest Accessory to Principal—Interest Accrued before Principal Barred—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

The plaintiffs, as the executors of N. who died in 1921, alleged that about November 4, 1907, N. lent to the defendant a sum of 1500*l.*, the loan to bear interest at the rate of 5 per cent. per annum, and claimed in this action, the writ in which was issued on November 1, 1928, payment of the loan with the interest thereon which accrued during the six years ending on November 1, 1928. In spite of the fact that the recovery of the loan was barred by the Limitation Act, 1623, on June 30, 1926, that was to say, six years after June 30, 1920, the date when the last payment of interest was made, as the plaintiffs admitted at the trial, the plaintiffs nevertheless proceeded with their claim for payment of so much of the interest as accrued between November 1, 1922, and June 30, 1926—the date at which the claim for the principal was barred—on the footing that at each half-year during that period a cause of action accrued in respect of each half-year's payment of interest:—

Held, that the principal sum having been barred by the statute, the interest so claimed was, as being only accessory to the principal, barred with it.

Hollis v. *Palmer* (1836) 2 Bing. (N. C.) 713; 3 Scott, 265; 5 L. J. (C. P.) 264 considered.

Witness Action.

In this action the plaintiffs, as the executors of the will of Mrs. Jane R. Northcott, who died on May 10, 1921, by their writ which was issued on November 1, 1928, claimed a declaration that the defendant Walter Clifford Northcott was a trustee of a sum of 1500*l.* and was liable to account to the plaintiffs therefor with interest thereon at 5*l.* per cent. per annum; and they claimed payment of that sum and the interest due thereon. By their statement of claim they alleged that the deceased testatrix, who was the defendant's sister-in-law, had about November 4, 1907, entrusted to the defendant a sum of 1500*l.* for the purpose of its being invested by him in a certain business in which he was then purposing to become a partner, that sum to bear interest at 5*l.* per cent. per annum; further, that the defendant verbally agreed to hold that sum upon those trusts and had paid to the testatrix interest thereon by half-yearly payments at the date aforesaid down to June 30, 1920. The defendant denied the creation of a trust and pleaded that when that sum was handed to him, it was handed to him as a gift, to enable him to acquire a share in the business and that, in recognition of the deceased's generosity, but without any obligation so to do, he had paid to the deceased testatrix a sum which was equivalent to 5 per cent. interest on the loan, those payments having been made half-yearly, and the last of them having been made on June 30, 1928. The defendant further pleaded the Limitation Act, 1623.

At the trial, counsel for the plaintiffs, recognizing the difficulty of establishing a trust of the money, obtained leave of the Court to amend their statement of claim by pleading, in the alternative, a loan of the money at 5*l.* per cent. per annum and claiming, in any event, payment of all interest which accrued within the period of six years before November 1, 1928, the date of the issue of the writ. At the trial the plaintiffs conceded that the principal sum of 1500*l.* was barred by the Limitation Act, 1623, on June 30, 1926; that was to say, after the expiration of six years from June 30, 1920, the date when the last payment of interest was made, and in the absence of any acknowledgment in the meantime; and they abandoned their claim to so much of those arrears of interest as accrued after the date at which the principal sum became barred, with the result that the issue was confined to a claim to so much of those arrears as accrued before the principal sum became barred.

Pritt K.C. and *N. A. Beechman* for the plaintiffs. The doctrine that interest is accessory to the principal and that, once the principal is barred, interest is barred with it, only means that, once the principal is barred, no interest accruable thereafter can be recovered. But interest which accrued due before the principal became barred can be recovered until the claim for such interest, taken by itself, would become barred. The decided cases are concerned with instances of claims for interest which accrued after the principal has become barred. In such a case it may be truly said that the interest dies with the principal, because the principal, being dead, cannot produce any more interest: *Clark* v. *Alexander*. (1) But it is otherwise when interest has come into existence while the principal is still "alive." Such interest has thenceforward a separate existence and can be recovered separately. The proposition that interest is not necessarily accessory to the principal finds support in the case of *Hollis* v. *Palmer* (2), where Tindal C.J. says: "'Generally' speaking, interest is always treated as an accessory to the principal debt." The proposition is further supported by the case of *Collyer* v. *Willock* (3), where Best C.J. says: "Payment of the principal does not raise any implied promise to pay the interest." Again interest is recoverable as a debt apart from the principal: Bullen and Leake's Precedents of Pleadings (4); and an action for debt will lie for interest on money without alleging any special contract: Wms. Saund. (5) Further it has been held that interest is in the nature of damages and is no part of the debt: *Cameron* v. *Smith*. (6) *Parr's Banking Co.* v. *Yates* (7) affords another instance of a separate cause of action in respect of interest.

[*Reeves* v. *Butcher* (8); *Henton* v. *Paddison* (9); and *Skene* v. *Cook* (10) were also cited.]

(1) (1844) 8 Scott, N. R. 147, 165.
(2) (1836) 3 Scott, 265, 269.
(3) (1827) 4 Bing. 313, 314.
(4) 8th ed., p. 216, note (*e*).
(5) Vol. i., pp. 204, 205, note (*t*).
(6) (1819) 2 B. & Ald. 305, 309.
(7) [1898] 2 Q. B. 460.
(8) [1891] 2 Q. B. 509.
(9) (1893) 68 L. T. 405.
(10) [1901] 2 K. B. 7; [1902] 1 K. B. 682.

Sir Boyd Merriman K.C. and *Swords K.C.* for the defendant. We rely on the decision in *Hollis* v. *Palmer.* (1) There is here no contract to pay interest independently of the principal loan. In the absence of such a contract, the interest must be deemed a mere accessory to the loan and the demand for the loan having become barred, the demand for the interest must fall with it: see also *Cheang Thye Phin* v. *Lam Kin Sang.* (2) *Parr's Banking Co.* v. *Yates* (3) is distinguishable from the present case: there the principle of *Hollis* v. *Palmer* (1) did not fit the facts of that case, because the payment of interest, etc., due from the party in relation to whom the guarantee was given was as much guaranteed as payment of the sums advanced. There the cause of action on the guaranty arose as to each item of the account as soon as that item became due and was not paid, so that time began to run in respect of each item from that date: the guarantor was not liable to pay interest as interest, but because he had agreed as upon a separate contract to pay interest. Because one item for which he was liable was barred, the other items were not on that account barred also. Further, a guarantor may be under a different liability from the principal debtor. Their respective liabilities do not run pari passu as regards the Statute of Limitation. The contract in the present case is to pay the loan with interest thereon at 5 per cent. There is no suggestion of a separate contract to pay interest independently of the principal. *Attwood* v. *Taylor* (4) did not decide that, in the ordinary course, interest upon interest can be recovered.

CLAUSON J. [stated the facts above set out and continued:] After a short discussion, it was recognized that, so far as any claim to repayment of the principal was concerned, the action, on the facts as stated by the plaintiffs' counsel in opening, must necessarily fail by reason of the operation of the Statute of Limitation. But an ingenious point was then put forward to justify the action, at all events, in part; and it was said that, though the principal became irrecoverable on June 30, 1926, such instalments of interest could be recovered as accrued between November 1, 1922 (six years before the issue of the writ), and June 30, 1926, when the principal became statute barred. The statement of claim was framed on the footing of a trust, but an amendment was asked for and, subject to any question as to costs, allowed in these terms: "In the alternative the plaintiffs will contend that on or about November 4, 1907, the deceased lent to the defendant a sum of 1500*l*., the said loan to bear interest at 5 per cent. per annum. The plaintiffs will, in any event, claim all interest accrued due within a period of six years before the issue of the writ herein." The plaintiffs argue that as each half-yearly day for payment came, a cause of action accrued to the plaintiffs and, accordingly, that they are entitled to claim interest not going further back than November 1, 1922, on the footing that every half-year a claim for interest arose, that claim arising within six years before the issue of the writ. It was, however, conceded by the plaintiffs that interest could not be claimed beyond June 30, 1926, being the end of the period of six years calculated from the last payment of interest; that is to say, interest could not be claimed after the date at which the principal money ceased to be recoverable by action. The claim struck me as novel. There must have been many cases in which, when it has been discovered that, owing to some error or oversight, the statute has been allowed to run, plaintiffs would grasp eagerly at the tabula in naufragio which would be provided by the consolation of recovering something for interest, although the principal had gone past recall. I myself could recall no case in which such a claim had been made, and I find on reference to a judgment, which I shall have to refer to again, of Tindal C.J. in the case of *Hollis* v. *Palmer* (1) that the experience of others seems to have been the same. In that case a question arose on the form of the pleadings, and it is not easy to detach from the report the exact points that were decided; but one suggestion made was, that the fact

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(1) 2 Bing. (N. C.) 713; 3 Scott, 265, 269; 5 L. J. (C. P.) 264.

(2) [1929] A. C. 670, 676, 677.

(3) [1898] 2 Q. B. 460.

(4) (1840) 1 Man. & G. 279.

(1) 2 Bing. N. C. 713; 3 Scott, 265; 5 L. J. (C. P.) 264.

that the principal had been barred by the statute did not prevent recovery of interest upon the debt, including interest which had accrued in respect of a period before the date at which the debt was barred. Tindal C.J. says (1)—I am reading from his judgment as reported in the Law Journal—"The first objection, without any reference to the mode of pleading, appears to be reducible to this, that the statute does not operate as a bar to the recovery of the interest, though it does to the recovery of the note, and that an action may be maintainable for the interest, though it would not for the principal. This supposition appears to proceed on the ground, that the cause of action may be severed and divided. But there is but one contract, from which alone the principal and the interest arise. The contract upon which they are founded is one and the same; they constitute, and may be considered as the principal and accessory of the debt; and by the rule of law, if the principal be barred, the accessory falls with it to the ground; and, for myself, I must say, that this is the first time, within my experience, that I have heard the question entertained." Accordingly, I think that, supported by that observation of Tindal C.J., I am justified in regarding the claim of the plaintiffs—that notwithstanding the fact that the principal is barred, interest accruing before the time at which the principal became barred is recoverable—as a claim which, to the ordinary practitioner, would appear paradoxical, and requiring to be supported, if it can, by the clearest authority. Now when the authorities are investigated in order to see how the matter stands what is found is this. I take as a typical statement of the law the statement to be found under the title "Money and Interest on Money" in Lord Halsbury's Laws of England (2): "If the principal is barred by a statute of limitation, the interest is, as a general rule, barred also"; and the decision in *Hollis* v. *Palmer* (3) is referred to as the leading authority for that proposition. In a very recent case the matter came up incidentally for consideration before the Privy Council in *Cheang Thye Phin* v.

(1) 5 L. J. (C. P.) 266.

(2) Vol. xxi., p. 41, para. 76.

(3) 2 Bing. N. C. 713; 3 Scott, 265; 5 L. J. (C. P.) 264.

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Lam Kin Sang. (1) I need not state the somewhat complicated facts of that case, but Lord Warrington in delivering the judgment of the Board treats the matter as settled law. He says (2): " The claim of the plaintiffs, except as regards sums advanced since March 30, 1908, has been held to be barred by the statute. It seems to their Lordships to follow that there being no independent contract to pay interest, the interest is a mere accessory of the principal, and if the principal is irrecoverable so is the interest on it: see *Hollis* v. *Palmer*." (3) Sitting as I am in a Court of first instance, it might be enough for me, I conceive, to stop there, because I have in the statement of Tindal C.J. and the repetition of it by Lord Warrington in the Privy Council a statement which justifies me in treating the contention which is put forward by the plaintiffs, as one which is so contrary to the general understanding of practising lawyers that, if the contention is to be established, it must be established in a higher Court than a Court of first instance. But in deference to the interesting arguments which have been put before me by Mr. Pritt and Sir Boyd Merriman I will add a few words.

On referring to the report of *Hollis* v. *Palmer* in Bingham's New Cases, one finds the judgment of Tindal C.J. reported in somewhat different terms from the language I have cited from the report in the Law Journal. His Lordship according to the report in Bingham said (4): " Perhaps in cases where there is an express contract to pay interest independently of principal, there might be ground for such an argument; but in ordinary cases, interest has always been deemed a mere accessory of the loan, and when the demand for the principal is barred, the accessory falls along with it." That sentence gives rise, of course, to this difficulty, that it would seem to suggest that in some cases, at all events, where there is an express contract to pay interest independently of the principal, the interest and the principal can be treated as being wholly different matters, and the barring of the principal might be

(1) [1929] A. C. 670.

(2) Ibid. 676, 677.

(3) 2 Bing. N. C. 713; 3 Scott, 265; 5 L. J. (C. P.) 264.

(4) 2 Bing. N. C. 713, 716, 717.

treated as not barring the claim to the interest. It may be, I do not say that it is, that the Chief Justice had in mind such a case as that where there is a covenant to pay the principal and a separate covenant to pay interest. That is not the present case; for the present case, as appears from the way in which it has been pleaded by amendment after this point had been raised and after, of course, grave consideration, is a case where the agreement to pay the interest was contained in and formed part of the agreement to pay the principal. It is pleaded in the words that "the deceased lent the defendant the sum of 1500*l.*, the said loan to bear interest at 5 per cent. per annum." I do not want it to be supposed that in my opinion the mere existence of two separate covenants, one as to principal and one as to interest, would make any difference; but it would appear that Tindal C.J. had some cases in his mind in which, for some reason or other, the interest was payable under such circumstances that it could not be treated as an accessory to the principal.

I was referred to *Parr's Banking Co.* v. *Yates* (1) as a case which throws some light on the matter. That was a case not between creditor and debtor, but between creditor and guarantor; and it was there held that the liability of the guarantor to pay a sum which, as between creditor and debtor, was interest, was a liability of such a character that the liability of the guarantor to pay that sum continued, irrespective of the question whether or not the principal upon which that sum, as between creditor and debtor, was interest, had ceased to be recoverable. It may be that that is the kind of case that Tindal C.J. had in mind. On considering the judgments of the Court of Appeal in that case, I am disposed to agree with the argument put forward by Sir Boyd Merriman that that case, so far from throwing any doubt upon the doctrine which, as I have ventured to point out, the text-books and the profession generally have deduced from the case of *Hollis* v. *Palmer* (2), indeed supports that doctrine, and I think that is the right view, because A. L. Smith L.J. in giving the leading judgment in *Parr's*

(1) [1898] 2 Q. B. 460.

(2) 2 Bing. N. C. 713; 3 Scott, 265; 5 L. J. (C. P.) 264.

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Banking Co. v. *Yates* (1) said: "The doctrine that interest is an accessory which falls to the ground with the principal does not apply to a case like this, because the payment of interest, commission and other banking charges due from the guaranteed party is as much guaranteed as payment of the sums advanced themselves." By that language I understand the Lord Justice to hold it as sound doctrine that interest is an accessory which falls to the ground with the principal; but that that doctrine did not apply to that case, because the sum which was interest as between the creditor and the debtor possessed another character as between the creditor and the guarantor; it was a sum which was guaranteed as a net sum and not as mere interest accessory to a principal. If I have rightly interpreted the view of A. L. Smith L.J. it seems to me reasonably clear that the authority of that case, so far as it goes, supports the doctrine to which I have referred. I may add that in *Skene* v. *Cook* (2) Channell J. said: "When the mortgage debt has gone, the right to interest has gone also; no statute enables you to recover interest after the right to recover the principal has been lost. In the case of a mortgage the interest is dependent upon and accessory to the principal." That statement is no doubt merely a dictum; but it is made by a very learned and experienced judge; it corroborates the view that after the principal has become statute barred the claim to interest accruing before the time of the barring of the principal, is a claim which does not commend itself to the general understanding of the profession. Accordingly, I hold that since the claim to the principal is barred by lapse of time, the claim to the interest on it is barred also, and accordingly the plaintiffs cannot succeed in the claim so ingeniously put forward for interest between the dates that I have mentioned. The action will accordingly be dismissed.

Solicitors: *Mayo, Elder & Co.*; *Herbert Oppenheimer, Nathan & Vandyk.*

(1) [1898] 2 Q. B. 460, 465.

(2) [1901] 2 K. B. 7, 15.

H. C. H.

END OF VOL. II. AND OF CHANCERY SERIES FOR 1930.

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BANKRUPTCY — *Fraudulent Preference — Payment with View of giving Preference — Payment by innocent Debtor on Advice of Agent — View of Agent to prefer — Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 44.

Principle stated by Lord Halsbury L.C. in *Blackburn, Low & Co.* v. *Vigors* (1887) 12 App. Cas. 531, 537, 538 applied. *In re* Drabble Brothers

Clauson and Farwell JJ. and C. A. 211

2. —— *Fraudulent Transfer — Delaying Creditors — Transfer of Business Assets (comprising whole of Debtor's Property) to Private Company—Relation back of Trustee's Title—Protected Transaction—Bona Fides—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*b*); *s.* 45.

In re Simms - - - **Clauson J. 22**

3. —— *Husband and Wife—Policy of Assurance by Husband "for Benefit of Wife"—Construction—Death of Wife before Husband—Interest of Husband in Policy—Married Women's Property Act,* 1870 (33 *&* 34 *Vict. c.* 93), *s.* 10.

In re Browne's Policy [1903] 1 Ch. 188 applied.

Robb v. *Watson* [1910] 1 I. R. 243 approved.

In re Collier - - **Clauson J. 37**

4. —— *Money-lender — Loan — Judgment for Debt with Interest at Rate exceeding* 5 *per cent. — Bankruptcy Notice — Non-compliance — Receiving Order — Validity — Money-lenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 9, *sub-s.* 1.

In re A Debtor - - - **C. A. 239**

BANKRUPTCY—*continued.*

5. —— *Police Pension—Vesting in Trustee precluded by Statute—Court's Power to order Part Payment to Trustee for Creditors' Benefit—Jurisdiction—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 18, *sub-s.* 1; *s.* 51, *sub-s.* 2—*Police Pensions Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 31), *s.* 14, *sub-s.* 1.

Ex parte Huggins (1882) 21 Ch. D. 85 and *In re Shine* [1892] 1 Q. B. 522 applied. *In re* GARRETT - - **Farwell J. 137**

6. —— *Procedure—Motion by Trustee in Bankruptcy in County Court—Evidence—Decision of County Court Judge—Prima facie case established—Adjournment of Motion by County Court Judge pending Appeal to Divisional Court.*

In re MOYNIHAN. *Ex parte* TRUSTEE **Clauson and Luxmoore JJ. 356**

7. —— *Proof—Shares in Company—Application for Shares—Defaulting Shareholder—Forfeiture of Shares by Company under Articles of Association—Loss sustained by Company on Reallotment—Bankruptcy of Shareholder—Company's Right of Proof for Unpaid Instalments—Rejection of Proof by Trustees in Bankruptcy—Validity of Forfeiture under Company's Articles—Quantum of Damage—Actual Loss sustained by Company.*

The principle laid down in *In re Randt Gold Mining Co.* [1904] 2 Ch. 468 considered and applied. *In re* BOLTON. *Ex parte* NORTH BRITISH ARTIFICIAL SILK, LD. **Luxmoore J. 48**

—— Tenant for life—Assurance by his trustee in bankruptcy to person next entitled—" Intent to extinguish the same "—Vesting order 1
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BEQUEST—Condition precedent—Fulfilment rendered impossible by operation of law—Validity of gift - - 67
See WILL 2.

BUILDING LINE—Ground floor of premises projecting beyond upper floors—Alteration of ground floor—" Front . . . . taken down in order to be rebuilt "—Claim to prescribe new building line - - - - 316
See LOCAL GOVERNMENT.

CASES :—

—— *Annesley, In re* [1926] Ch. 292.
Considered. *In re* ASKEW **Maugham J. 259**

—— *Att.-Gen.* v. *Hatch* [1893] 3 Ch. 36.
Considered. ATT.-GEN. *v.* PRICES' TAILORS (1928) LD. **Luxmoore J. and C. A. 316**

—— *Bain, In re* [1930] 1 Ch. 224.
Applied. *In re* STRATTON **Bennett J. 151**

CASES—*continued.*

—— *Baker* v. *Story* (1874) 31 L. T. 631.
Not followed. *In re* ROBINSON **Eve J. 332**

—— *Barnes, In re* (The Times, July 21, 1922).
Followed. *In re* SCHOALES **Bennett J. 75**

—— *Blackburn, Low & Co.* v. *Vigors* (1887) 12 App. Cas. 531, 537, 538.
Applied. *In re* DRABBLE BROTHERS **Div. Ct. and C. A. 211**

—— *Brewster* v. *Kidgill* (1697) 12 Mod. 166.
Dictum of Holt C.J. not followed. GRANT *v.* EDMONDSON **Clauson J. 245**

—— *Browne's Policy, In re* [1903] 1 Ch. 188.
Applied. *In re* COLLIER **Clauson J. 37**

—— *Casdagli* v. *Casdagli* [1919] A. C. 145.
Followed. *In re* ASKEW **Maugham J. 259**

—— *Chowood, Ld.* v. *Lyall* (2.) [1930] 1 Ch. 426.
Affirmed - - - **C. A. 156**

—— *Clark* v. *Adie* (*No.* 2) (1877) 2 App. Cas. 423; (1876) 3 Ch. D. 134.
Distinguished. FUEL ECONOMY CO., LD. *v.* MURRAY **Luxmoore J. and C. A. 93**

—— *Clements, In re* (1877) 46 L. J. (Ch.) 375.
Referred to. *In re* WILLIAM THOMAS SHIPPING CO., LD. **Maugham J. 368**

—— *Devonald* v. *Rosser & Sons* [1906] 2 K. B. 728, 741, 743.
Applied. SAGAR *v.* H. RIDEHALGH & SON, LD. - **Farwell J. 117**

—— *Dufour* v. *Pereira* (1769) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.
Applied. *In re* HAGGER **Clauson J. 190**

—— *Dunne* v. *Byrne* [1912] A. C. 407.
Applied. *In re* STRATTON **Bennett J. 151**
Followed. *In re* JACKSON **Eve J. 389**

—— *Farnsworth* v. *Garrard* (1807) 1 Camp. 38.
Distinguished. SAGAR *v.* H. RIDEHALGH & SON, LD. - **Farwell J. 117**

—— *Ford* v. *Peering* (1789) 1 Ves. Jun. 72.
Referred to. CLAYTON *v.* CLAYTON **Maugham J. 12**

—— *Green* v. *Humphreys* (1884) 26 Ch. D. 474.
Referred to. *In re* COLISEUM (BARROW), LD. - **Maugham J. 44**

—— *Holdsworth, Ex parte* (1838) 4 Bing. N. C. 386.
Referred to. CLAYTON *v.* CLAYTON **Maugham J. 12**

CASES—*continued.*

—— *Hollis* v. *Palmer* (1836) 2 Bing. (N. C.) 713; 3 Scott, 265; 5 L. J. (C. P.) 264.
Considered. Elder *v.* Northcott **Clauson J. 422**

—— *Houston* v. *Burns* [1918] A. C. 337.
Referred to. *In re* Stratton **Bennett J. 151**

—— *Huggins, Ex parte* (1882) 21 Ch. D. 85.
Applied. *In re* Garrett **Farwell J. 137**

—— *Ilkley Local Board* v. *Oswald Lister* (1895) 11 Times L. R. 176.
Referred to. *In re* William Thomas Shipping Co., Ld. **Maugham J. 368**

—— *Johnson, In re* [1903] 1 Ch. 821.
Not followed. *In re* Askew **Maugham J. 259**

—— *Kelsack* v. *Nicholson* (1596) Cro. Eliz. 496.
Applied. Clayton *v.* Clayton **Maugham J. 12**

—— *Kempthorne, In re* [1930] 1 Ch. 268, 283, 289, 293.
Applied. *In re* Newman **Farwell J. 409**

—— *King, In re* [1923] 1 Ch. 243.
Followed. *In re* Robertson **Bennett J. 71**

—— *Kitcat* v. *Sharp* (1882) 31 W. R. 227.
Referred to. *In re* William Thomas Shipping Co., Ld. **Maugham J. 368**

—— *Lancaster and Macnamara, In re* [1918] 2 K. B. 472.
Referred to. *In re* Joel's Lease **Maugham J. 359**

—— *Lord Buckhurst's Case* (1595) Moore, 488.
Applied. Clayton *v.* Clayton **Maugham J. 12**

—— *Lowman, In re* [1895] 2 Ch. 348.
Distinguished. *In re* Newman **Farwell J. 409**

—— *MacLaughlin* v. *Campbell* [1906] 1 I. R. 588.
Dicta of FitzGibbon and Holmes L.JJ. applied. *In re* Schoales **Bennett J. 75**

—— *Malone* v. *Minoughan* (1862) 14 Ir. C. L. 540.
Referred to. Clayton *v.* Clayton **Maugham J. 12**

—— *Mellish, In re* [1928] W. N. 226; [1929] 2 K. B. 87.
Distinguished. *In re* Newman **Farwell J. 409**

—— *Mid-Kent Fruit Factory, In re* [1896] 1 Ch. 567.
Followed. *In re* City Equitable Fire Insurance Co., Ld. (2.) **Maugham J. and C. A. 293**

—— *Mondel* v. *Steel* (1841) 8 M. & W. 858.
Distinguished. Sagar *v.* H. Ridehalgh & Son, Ld. - **Farwell J. 117**

—— *Pollitt, In re* [1893] 1 Q. B. 455.
Followed. *In re* City Equitable Fire Insurance Co., Ld. (2.) **Maugham J. and C. A. 293**

—— *Queen* v. *Payne* [1896] 1 Q. B. 577.
Referred to. *In re* William Thomas Shipping Co., Ld. **Maugham J. 368**

—— *Randt Gold Mining Co., In re* [1904] 2 Ch. 468.
Considered and applied. *In re* Bolton - - **Luxmoore J. 48**

—— *Read and Huggonson's Case* (1742) 2 Atk. 469.
Followed. *In re* William Thomas Shipping Co., Ld. **Maugham J. 368**

—— *Robb* v. *Watson* [1910] 1 I. R. 243.
Approved. *In re* Collier **Clauson J. 37**

—— *Ross, In re* [1930] 1 Ch. 377.
Followed. *In re* Askew **Maugham J. 259**

—— *Shine, In re* [1892] 1 Q. B. 522.
Applied. *In re* Garrett **Farwell J. 137**

—— *Stanford, In re* [1924] 1 Ch. 73.
Distinguished. *In re* Robertson **Bennett J. 71**

—— *Stoddart, In re* [1916] 2 Ch. 444.
Distinguished. *In re* Laidlaw **Eve J. 392**

—— *Udny* v. *Udny* (1869) L. R. 1 H. L. Sc 441.
Considered. *In re* Askew **Maugham J. 259**

—— *Ward* v. *Van der Loeff* [1924] A. C. 653.
Applied. *In re* Robinson **Eve J. 332**

—— *Wedgwood, In re* [1921] 1 Ch. 601.
Applied. *In re* Laidlaw **Eve J. 392**

—— *Wheeler, In re* [1928] W. N. 225; [1929] 2 K. B. 81.
Distinguished. *In re* Newman **Farwell J. 409**

—— *Whitaker, In re* [1901] 1 Ch. 9.
Followed. *In re* Bush **Luxmoore J. 202**

—— *Williams and Duchess of Newcastle's Contract, In re* [1897] 2 Ch. 144.
Referred to. Clayton *v.* Clayton **Maugham J. 12**

—— *Williams* v. *North's Navigation Collieries* (1889), *Ld.* [1906] A. C. 136.
Followed. Sagar *v.* H. Ridehalgh & Son, Ld. - - **Farwell J. 117**

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See Charity 2.

CHARITY—*Bequests to the Vicar for the time being of the Parish of M.—"Parochial institutions or purposes"—Validity.*

Houston v. *Burns* [1918] A. C. 337 referred to.

Dunne v. *Byrne* [1912] A. C. 407 and *In re Bain* [1930] 1 Ch. 224 applied. *In re* Stratton. Stratton *v.* Att.-Gen. **Bennett J. 151**

2. —— *Charitable bequest — Residue for restoration or maintenance of Church—Fund more than sufficient—General charitable intention—Surplus—Cy-près.*

In re King [1923] 1 Ch. 243 followed.
In re Stanford [1924] 1 Ch. 73 distinguished. *In re* Robertson. Colin *v.* Chamberlin **Bennett J. 71**

3. —— *Will—Gift "to the Roman Catholic Church, for the use thereof"—Validity.*

Dicta of FitzGibbon and Holmes L.JJ. in *MacLaughlin* v. *Campbell* [1906] 1 I. R. 588 adopted.

In re Barnes (The Times, July 21, 1922) followed. *In re* Schoales. Schoales *v.* Schoales - - - - - **Bennett J. 75**

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—— Bequest to Archbishop of Wales for charitable purposes or to be applied as he might think fit for helping to carry on Church's work in Wales—Bequest void - - - - 389
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COMPANY — *Debenture Holders' Action — Appointment of Receiver — Publication of Interview criticizing Application for his Appointment — Motion to Commit — Contempt of Court—Jurisdiction.*

Kitcat v. *Sharp* (1882) 31 W. R. 227; *Ilkley Local Board* v. *Oswald Lister* (1895) 11 Times L. R. 176; *The Queen* v. *Payne* [1896] 1 Q. B. 577; and *In re Clements* (1877) 46 L. J. (Ch.) 375 referred to.

Dictum of Lord Hardwicke in *Read and Huggonson's Case* (1742) 2 Atk. 469 followed. *In re* William Thomas Shipping Co., Ld. H. W. Dillon & Sons, Ld. *v.* The Company and Others. *In re* Sir Robert Thomas and Others - - **Maugham J 368**

—— Forfeiture of shares—Bankruptcy of shareholder — Loss sustained by company on reallotment—Right of proof - - - - - - 48
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2. —— *Issue of 8 per cent. Notes — Noteholders to share in Profits available for Dividend after payment of 8 per cent. on ordinary Shares—Meaning of "profits available for dividend."*

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3. —— *Issue of Stock Warrant to Bearer—Legality of—Companies Act,* 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 27, 31—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 37, *sub-s.* 5; *ss.* 38, 285—*Companies Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 23)—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 50, *sub-s.* 1 (*c*); *s.* 62, *sub-s.* 2; *ss.* 70, 71, 72, 95, 97, *sub-s.* 1; *ss.* 108, 380; *Table A, arts.* 30, 31, 32, 33.

Pilkington *v.* United Railways of the Havana and Regla Warehouses Ld. **Luxmoore J. 108**

4. —— *Scheme of Arrangement—Transfer of Shares to another Company — Approval by Majority of Shareholders — Dissenting Shareholders — Power to determine Terms of Purchase of Shares — Original Scheme superseded by later Amalgamation — Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 155.

In re Castner-Kellner Alkali Co., Ld. **Eve J. 349**

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5. —— *Winding-up—Mutual Dealings—Treaty of Reinsurance—Deposit for specific Purpose — Surplus — Set-off — Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 31—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 107.

In re Pollitt [1893] 1 Q. B. 455 and *In re Mid-Kent Fruit Factory* [1896] 1 Ch. 567 followed. *In re* City Equitable Fire Insurance Co., Ld. (2.) **Maugham J. and C. A. 293**

6. —— *Winding up—Proof for Directors' Fees — Rejection in respect of Fees due more than six years—Balance sheets signed by Directors at Board Meetings—Directors as agents for Company and creditors for Fees—*

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Balance sheets not acknowledgments of liability for fees—Statute of Limitations, 1623 (21 *Jac.* 1, *c.* 16)—*Lord Tenterden's Act,* 1828 (9 *Geo.* 4, *c.* 14), *s.* 1—*Mercantile Law Amendment Act,* 1856 (19 *&* 20 *Vict. c.* 97), *s.* 13—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 113.

Green v. *Humphreys* (1884) 26 Ch. D. 474 referred to. *In re* The Coliseum (Barrow), Limited - - - **Maugham J. 44**

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CONFLICT OF LAWS—*Legitimation Abroad of Child of British Subject with foreign Domicil — Rights in English Law acquired by virtue of Parent's foreign Domicil — Lex domicilii—Recognition in English Courts — Renvoi recognized in English Courts only when treated by foreign Law as Part of Lex domicilii —Legitimacy Act,* 1916 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-s.* 2; *s.* 8.

Casdagli v. *Casdagli* [1919] A. C. 145 and *In re Ross* [1930] 1 Ch. 377 followed.

In re Johnson [1903] 1 Ch. 821 dissented from.

Udny v. *Udny* (1869) L. R. 1 H. L. Sc. 441 and *In re Annesley* [1926] Ch. 692 considered. *In re* Askew. Marjoribanks *v.* Askew - - - **Maugham J. 259**

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The decision of Lord Camden in *Dufour* v. *Pereira* (1769) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304 applied. *In re* Hagger. Freeman *v.* Arscott - - - **Clauson J. 190**

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In re Lancaster and Macnamara [1918] 2 K. B. 472 referred to. *In re* Joel's Lease. Berwick *v.* Baird - - **Maugham J. 359**

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Decision of Luxmoore J. [1930] 1 Ch. 426 affirmed. Chowood, Ld. *v.* Lyall (2.) **C. A. 156**

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Att.-Gen. to The Prince of Wales *v.* Bradshaw - - - **Farwell J. 279**

2. —— *Open Space — Private Railway Siding—Legal Ownership in undivided Shares—Trustees of different Trusts—Rights of Access and User vested in Lessees, Licensees and Beneficiaries under Declaration of Trust—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Schedule I., Part V., para.* 2.

In re Townsend. Townsend *v.* Townsend - - - - - **Eve J. 338**

3. —— *Undivided Share of Land—Specific Devise in* 1922—*Statutory Trusts imposed in* 1926—*Testator's Death in* 1929—*Construction of specific Devise—Conversion—Ademption—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 35; *Schedule I., Part IV., para.* 1 (2.).

In re Mellish (stated in) [1928] W. N. 226; reprinted [1929] 2 K. B. 82; *In re Wheeler* [1928] W. N. 225; reprinted [1929] 2 K. B. 81; and *In re Lowman* [1895] 2 Ch. 348 distinguished.

In re Kempthorne [1930] 1 Ch. 268, 283, 289, 293 applied. *In re* Newman. Slater *v.* Newman - - - **Farwell J. 409**

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Hollis v. *Palmer* (1836) 2 Bing. (N. C.) 713; 3 Scott, 265; 5 L. J. (C. P.) 264 considered. Elder *v.* Northcott
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For Mode of Citation, see Beginning of Index.
[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,
AND
Printed by W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C.4.

"THE LAW REPORTS, 1930," for July, consist of:—

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